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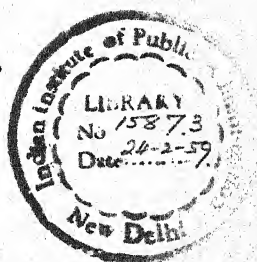
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[IN THE COMPENSATION COURT.]

LAMMAS v. MANAWATU COUNTY.

COMPENSATION COURT. Palmerston North. 1945. November 30.
1946. March 7. ONGLEY, J.

Workers' Compensation — Assessment — Permanent Partial Incapacity — Suitable Employment found after Accident by Pre-accident Employer—Lump-sum Award or Weekly Payment—Test to be applied—"Able to earn"—Workers' Compensation Act, 1922, s. 5 (3)—Workers' Compensation Amendment Act, 1943, s. 3.

In awarding a lump sum under s. 5 (3) of the Workers' Compensation Act, 1922, by way of compensation instead of a weekly payment, ability to earn is the test to be applied, notwithstanding s. 3 of the Workers' Compensation Amendment Act, 1943.

ACTION claiming compensation under the Workers' Compensation Act, 1922.

Plaintiff, aged thirty-one, was injured on July 18, 1944, by a truck running over his right hand while he was trying to brake the truck with
5 a chock of wood. His hand was badly injured and permanently injured. He was off work until October 25, 1944, and then went back into the employment of the defendant County Council. In his evidence he said :

I was put on light work by defendant. They gave me a job with the carpenter
10 working round timber. I suppose the county would have been well disposed to keeping me on, but they said they couldn't find me a lighter job than they gave me. I left my work because my hand would not stand up to it.

Plaintiff had carried on that work for about five weeks. His evidence was :

15 I stayed there until November 27. My hand started to play up with me and I went back to the doctor and he told me to knock off work, so I left on November 27. I can't take any weight on the palm of the hand down the fingers—I can't take any weight on the fingers. Since November 27 I have tried gardening at home, but can't put pressure on the rake-handle and can't grip the rake-handle.
20 On account of doctor's orders I decided to go. He said that I would have to have a lighter job, and because I could not find a lighter job I had to go off. I study the advertisements in the paper. I have not had experience on a dairy-farm or in a milk-bar. I would never go into hotel work. I have convictions against working in hotels. I have been helping my father round home for my board. I could
25 not expect him to keep me for nothing. I helped my father in the garden planting out plants, peas. I agree that perhaps a job as gardener would be suitable. I cannot use a spade at digging. I agree I have made no real attempt to get work until this claim is finished.

In reply to the Court he said :

30 When compensation ends I will have to get some sort of job, but will not go into an hotel because I cannot stand the smell of liquor.

Dr. King, called for plaintiff, said :

Plaintiff's right hand was seriously injured and the condition can be regarded as stabilized. The hand is useless for such movements as shaving or for work
35 requiring fine movements of the finger tips. It is of no use either in pick or shovel work. Considering that this is the right hand and that plaintiff is right-handed for most things and, further, that he is an unskilled labourer, the degree of permanent disability is best assessed in relation to his usefulness in the general labour market. The impairment of function of the hand in my opinion not only amounts to at
40 least 50 per cent. of that due to total loss of the hand, but further reduces his efficiency as a labourer to a like degree. I think his reduction of efficiency amounts to at least 50 per cent. loss of the hand. I think you could say that in the general

labour market he is worth only 50 per cent. for efficiency. I think he should be able to take weight on his fingers. The tendons were not divided.

In cross-examination Dr. King says :

I considered in May that his improvement had reached a stage of arrest and I based his disability at the percentage already indicated, and there was no reason why he should not have undertaken work of a light character to which he was suited at that time. I assessed him in relation to his usefulness as a general labourer when I said he was 50 per cent. disabled. I think he would have to turn down 50 per cent. of all jobs offering.

A. M. Ongley, for the plaintiff. The Workers' Compensation Amendment Act, 1943, has not in any way limited the Court's jurisdiction to fix a lump sum on the basis of a percentage injury where there is real permanent disability, as here. It has been found that in this case there is a definite permanent substantial disability, and that, although the plaintiff was offered work at his pre-accident wages, that was in the nature of a compensation and was a wage he was not able to earn. The Amendment Act, 1943, limits the wording of the Amendment Act, 1936, to suitable employment provided by the employer by whom he was employed before, but it does not appear to limit the principle in any way.

[ONGLEY, J. Previous to the Amendment Act, 1943, you had to regard his ability to earn, whether he was earning or not.]

Ongley, continues. So far as assessing the compensation is concerned, the previous Act said "is earning or is able to earn in some suitable employment," whereas the Amendment Act, 1943, said which he "is earning after the accident in any employment or business, "or is able to earn in some suitable employment," found for him by his employer. It is not general ability to earn. He is still entitled to go outside what he is able to earn: *Bolland v. Levin and Co., Ltd.*(1), and *Shaw v. Charming Creek - Westport Coal Co., Ltd.*(2).

[To the Court:] The Minimum Wage Act, 1945, does not affect the compensation; it provides what a man can receive per hour, or per day, or per week. But also under that Act, if a man is injured, he is entitled to apply to have that wage reduced and work under a lower wage. Nobody would employ a man to whom he would have to pay an excessive rate of pay. He would be most of his time out of work, or he would have to apply for an underrate worker's permit. Consequently, the Minimum Wage Act, 1945, would not affect his earnings after the accident so far as compensation is concerned.

Laurenson, for the defendant, relied on s. 5 (6) of the Workers' Compensation Act, 1922, as amended. The plaintiff's remedy may have gone for the reason that the employer provided a job for him in which he was paid full wages, and, therefore, he suffered no loss of earning-power.

A distinction must be made between what the plaintiff was being paid and what he was able to earn. It is recognized by the defendant that he was not able to earn at that stage although he was being paid the wages. He definitely has suffered loss of earning-power, and the case was argued as to what was the loss of earning-power in accordance with the medical evidence. Ability to earn must still be taken into account: the plaintiff was able to earn something, but only for a month or two.

(1) [1944] N.Z.L.R. 689.

(2) [1945] G.L.R. 401.

[ONGLEY, J. And, after that, he would have been able to earn something in a lighter job if he could have got it. Is the availability of the job the test now? It used to be ability to earn, whether a job was available or not.]

5 Laurenson, continues. In this case, ability to earn may have some bearing, in view of the fact that the job was provided for the plaintiff, and was available for him apparently so long as he continued in it; but through lack of interest in his recovery he threw it up.

[To ONGLEY, J.] On that basis, he is entitled to full compensation.

10

Cur. adv. vult.

ONGLEY, J. [After stating the facts, and giving extracts from the evidence, as above:] There are differences in the evidence that should be noted. Plaintiff says:

15 (i) My hand started to play up. I went to the doctor and he told me to knock off.

(ii) I can't take any weight on the fingers.

Dr. King says:

(i) I think he should be able to take weight on the fingers.

20 (ii) There is no reason why he should not have undertaken work of a light character.

Dr. King did not say he told plaintiff to knock off. It should also be noted that plaintiff says he has made no real attempt to get work and is not going to make any real attempt to get work until his claim is finished. May-be he takes the view that, if he got work, he would or
25 might prejudice his claim by showing ability to work and earn wages, but that view overlooks the fact that plaintiff must prove inability to work and the extent of that inability. The fact that he will not get work might lead to an inference that he is unwilling to show what work he can do and so result unfavourably to him.

30 Counsel for the defence relies on s. 5 (6) of the Act which, as amended, reads:

5. (6) Except as provided in section nine hereof, during any period of partial incapacity the weekly payment shall be an amount equal to sixty-six and two-thirds per centum of the difference between the amount of the worker's weekly
35 earnings at the time of the accident and the weekly amount which the worker is earning after the accident in any employment or business, or is able to earn in some suitable employment provided or found for him after the accident by the employer by whom he was employed at the time of the accident, but not exceeding in any case four pounds ten shillings a week.

40 He submits that the claim must fail because the defendant county found employment for plaintiff at his pre-accident rate of pay: that it was employment by a local body and plaintiff would have received lenient treatment, and that, if plaintiff had been willing to continue working, the job would still have been available to him. The fact is that the
45 defendant county did provide a job for plaintiff and paid him his full pre-accident rate of pay, and that plaintiff left the job after working for some five weeks. He was able for five weeks to do what he was called upon to do. That is *prima facie* evidence that he could carry on the job. His reasons for knocking off—(i) that he could not take
50 weight on his fingers, (ii) that the doctor told him to knock off—are not supported by his doctor. The fact that he decided not to work until his claim is settled must also be taken into consideration in deciding whether he could or could not have carried on the job.

Having regard to these facts, I am unable to say that plaintiff has displaced the *prima facie* evidence that he could carry on the job. The fact that he was being paid full wages is not conclusive evidence that he is earning or able to earn those wages. The fact is the job was made to suit plaintiff. Herbert V. Bond, engineer for the defendant county, 5 says :

We wanted to be lenient and give him an opportunity. It is correct that if plaintiff had wished to continue with defendant he could have, even in spite of the fact that he was not doing a full day's work. We have other employees who are somewhat disabled similarly to plaintiff. I have one man who has portions of two fingers amputated—one on the lower joint, but I am not sure if the other is at the same joint or the first joint. He does his work very efficiently. We employ a lot of men. If plaintiff's condition is the same as it was when he went off work he certainly cannot do the work. 10

Less than a normal amount of work was being accepted from plaintiff because of his injury and because his doctor had suggested that plaintiff might improve by working. Dr. H. L. Widdowson, called for the defendant county, says his examination does not differ from Dr. King's except that the scars on the palm of plaintiff's right hand are good, supple, and free from adhesions. Dr. Widdowson assessed plaintiff's disability at 30 per cent. as a worker in the general labour market, and said : 15 20

At the time of the examination he did not appear to be anxious to help.

In cross-examination Dr. Widdowson said :

In a case like this where there is a definite disability to the hand I think that is likely to improve. I think the compensation aspect prevents him from bending his finger. I agree with Mr. King as to the medical aspect. Where I disagree is as to his value in the labour market. He cannot do the finer manipulation and cannot do anything requiring a tight grip. He could not do pick and shovel work, raking, digging. Despite the things he cannot do I do not think he is limited in the labour market more than 30 per cent. 25 30

To the Court he said :

I think he could do some gardening work, cleaning work, droving, caretaker, porter, liftman—he could do any of those jobs quite well.

Dr. Wylie, also called for the defendant county, says : 35

In this case, having seen plaintiff several times and having watched the result of treatment, he is best described as a not very co-operative individual. In my last report I said, "So far as permanent disability is concerned, this undoubtedly is present and is of very material kind. It amounts, in my opinion, to not less than 30 per cent. of his value in the general labour market or to 70 per cent. of the value of the hand. Although he is so severely handicapped from the point of view of his value in the general labour market, there is no reason why a suitable job should not be found for him." My estimate of 30 per cent. loss is his value in the general labour market. You can only reach that estimate by your experience in the past. 40 45

In cross-examination Dr. Wylie says :

I said he is a non-co-operative and disappointing patient. There is a way of curing that aspect—where he can be dealt with in a rehabilitation centre which we have not got in this country. Going to a rehabilitation centre where he can be treated adequately is the only way of preventing him from being put on the industrial scrap-heap. I do not know what is going to happen in the future. He is aged thirty-one and as time goes on his hand will get more and more useful to him and he will find in the course of time that he will be able to do things he cannot do now. I said he has lost 70 per cent. use of his right hand. 50

Plaintiff was earning £5 2s. 11d. per week at the time of the accident —that is, he was being paid that amount and was doing the normal day's work required by the job. He was receiving that amount in the "made" job after the accident, but was not doing the normal day's work. If plaintiff had been in that job and receiving that pay at the 55

date of hearing, that would not have been an answer to his claim because, as a result of the injury, he was not earning or able to earn that and because his injury is permanent. He might have remained in the job for a long time, but he is only thirty-one years of age and it could not be assumed or reasonably expected that he would remain in that job for the rest of his working-life. Sooner or later he would have to find another job and he would be entitled to be protected against future loss by a declaration of liability, suspended award, a lump sum, an adjournment, or other appropriate action. Actually he is out of the job, but his position cannot thereby be worse than if he were in the job. In either case he is entitled to be protected in accordance with the Act against future loss resulting from his injury.

Plaintiff asks for a lump-sum award. Counsel for the defendant county does not oppose a lump-sum award if plaintiff is entitled to an award, and submits that, notwithstanding the 1943 Amendment Act, ability to earn must be the basis. Plaintiff's counsel agrees with that view and says the only satisfactory way is to follow the procedure before the 1943 Amendment Act by basing the award on the medical estimate of the physical disability. The 1943 Amendment Act seemed to create a difficulty because of the words "earning after the accident in any employment or business, or is able to earn in some suitable employment provided or found for him after the accident by the employer by whom he was employed at the time of the accident." That seemed to make the test actual earnings—that is, a job as against ability to do a job. That difficulty disappears or does not arise in awarding a lump sum under s. 5 (3) because there the basis is "the weekly payments which in the opinion of the Court would probably become payable." What will probably become payable involves deciding what plaintiff can probably earn, which in turn rests on his ability to earn. It seems, therefore, that ability to earn is the test to be applied in fixing a lump sum under s. 5 (3) notwithstanding the 1943 Amendment Act.

Plaintiff was earning £5 2s. 11d. at the time of the accident. His injuries are such that he will not again be fit for work as a general labourer, and, in his own words, he "will have to get some sort of a job." At present he might succeed in finding a job at very little, if any, loss of wages. That would be the position if he found employment as a storeman, liftman, caretaker, or something of that sort. In any job at present he would probably earn not less than £4 per week, which means his loss of earnings would not be more than £1 2s. 11d. and his compensation rate 15s. 3d. per week. It may be that that will always be the position, but the Court cannot assume that times will remain as they are or that unemployment will not occur again. In times of unemployment plaintiff's bad hand might result in his being one of the unemployed. Something should be allowed to cover these contingencies, and, although on the evidence plaintiff will not be a general labourer any more, Dr. Widdowson's estimate of 30-per-cent. disability as a worker in the general labour market seems to be a fair basis on which to assess plaintiff's compensation. It means putting his earnings at about £3 12s. per week. He should be able to earn more than that, and, in putting it at that figure, I am allowing for the contingencies I have referred to. He has been paid compensation for the fourteen weeks he was off work—that is, to the time he started again with the defendant county—and £15 in addition. He knocked off work on November 27, 1944, and, as far as the evidence shows, he has

done very little since then; but his loss since then, whatever it is, is the result of knocking off the job he had and not trying to get another. In my opinion, the assessment should be as at that date on the basis of 30-per-cent. incapacity and the £15 should be deducted. This works out at £266 less the £15. I therefore give judgment for plaintiff for £251 plus the £1 medical fee if it has not been paid. I allow £18 18s. costs to cover both hearings, and £2 2s. for one medical witness.

Judgment for the plaintiff accordingly.

Solicitor for the plaintiff: *A. M. Ongley* (Palmerston North).

Solicitors for the defendant: *Innes and Oakley* (Palmerston North).

ROWBOTTOM v. SHAW, SAVILL, AND ALBION COMPANY, LIMITED.

COMPENSATION COURT. Wellington. 1945. December 10, 11, 20.
BLAIR, J.

Workers' Compensation—Accident arising out of and in the Course of the Employment—Coronary Occlusion—Whether related to Effort on Workers' Part—Workers' Compensation Act, 1922, s. 3.

The finding of the learned Judge in *Charlton v. Makara County*, [1945] N.Z.L.R. 335—to the effect that cases of heart disease described theretofore as coronary thrombosis should be divided into two classes, coronary occlusion and coronary insufficiency, the latter of which may be precipitated by effort or motion, and the clinical picture of which is different from that of coronary occlusion—amounts to no more than that the learned Judge had accepted the facts and opinions expressed by the doctors who gave evidence for the plaintiff in that case.

Charlton v. Makara County(1) explained.

In the present case, the learned Judge accepted the view of the medical evidence for the defence that the infarct agreed upon by all the witnesses was the result of coronary atheroma, followed by coronary occlusion—*i.e.*, thrombosis—which is a gradual and apparently insidious disorder blocking up the arteries of the heart, which is not related to external factors, and effort plays no part in causing it.

Fenton v. Thorley and Co., Ltd.(2), *Clover, Clayton, and Co., Ltd. v. Hughes*(3), and *Moore v. Tredegar Iron and Coal Co., Ltd.*(4), applied.

(1) [1945] N.Z.L.R. 335.

(2) [1903] A.C. 443; 5 W.C.C. 1.

(3) [1910] A.C. 242; 3 B.W.C.C. 275.

(4) (1938) 31 B.W.C.C. 359.

ACTION claiming compensation under the Worker's Compensation Act, 1922.

The plaintiff was a waterside worker resident in Wellington, forty-six years of age. He had been engaged on labouring work all his working-life, and in recent years had been employed on the waterfront in Wellington. The last job he did on the wharf was to assist in the loading of boxes of butter on to the ship *Dominion Monarch*, he being a member of the shore gang working on the wharf. The particular work of his gang consisted of taking 56 lb. boxes of butter out of a refrigerated truck standing at a convenient place in the vicinity of the hold in which

the butter was being loaded into the ship. There were four men concerned in the work being so performed. Two of these men were inside the truck placing butter-boxes on to a chute leading from the floor of the truck down to the wharf, and the other two men were stacking these
5 boxes to a height of three tiers on a wooden tray designed to support the boxes while being lifted from the wharf over the ship's side and down into the ship's hold.

The tray was 6 ft. square and about 5 in. thick. It had a hardwood framework to which was nailed a floor made of softish timber of about
10 1 in. in thickness. On the underside of the hardwood framework, protective planks were nailed to take the wear of the tray due to it being dropped or at times dragged on the wharf. At each corner of this tray there was a wire rope about 16 ft. long reaching diagonally and converging up to a bridle to which the winch-hook is attached. These
15 wire ropes were led through holes at each corner of the tray and fastened through the hardwood framework of the tray. The tray weighed between one and a half and two hundredweight. For one man to move it from a stationary position required a pull of one hundred and sixty pounds, but if (as was done in this case) two men dragged the tray along the wharf,
20 each man would exert a pull of between fifty and sixty pounds. These figures were ascertained by means of a spring balance. The practice was that after a tray was discharged into the ship's hold, it would be lowered empty to the wharf by the crane, and would then be dragged along the wharf some 15 ft. or so until it was in a convenient
25 position near the chute leading out of the insulated truck on the wharf. The dragging of this tray would be carried out by the two men working on the wharf, and their duty was, after moving the tray into a convenient position alongside the chute, to pick up the 56 lb. boxes of butter and stack them on the tray, three tiers high.

30 As between the four men engaged upon the loading operations, as indicated in the foregoing, they took hour about—the two men in the truck taking over the loading on to the tray, and the two men so engaged taking over the sending down the chute of the boxes in the railway-truck.

35 This work commenced on the *Dominion Monarch* on May 4, 1943, on which day they worked from 8 a.m. till 10 p.m., with the usual meal intervals, and on the next day, May 5, the work had proceeded from 8 a.m. until approximately 10 a.m., when what the claimant claimed to be the "accident" constituting the foundation of this claim occurred. He
40 states that when helping to drag the tray along so as to position it near the chute, as already indicated, he felt a pain. He said it was a heavy drag—a consistent drag—but from the weights above given it will be seen that the effort involved in the two men dragging the tray would be approximately the same as the muscular effort involved to one man in
45 picking up the 56 lb. boxes of butter off the chute and stacking them on the tray. He described the pain he suffered as across the chest, and that it became worse as he kept on working. He said :

I went on working and every time I started to fill a tray with butter the pain became worse. When I spelled between loadings the pain eased up a little. The
50 pain never went away completely. I continued working until the lunch hour at twelve o'clock. I knocked off at twelve o'clock for lunch. I resumed work at one o'clock, but still had a little pain. We carried on loading the butter on to the tray and the severe pain started again as soon as I started work. I carried on but towards two o'clock I told the foreman I didn't think I could stick the job and
55 asked him to replace me.

They were unable to find a substitute, so being unable to carry on longer, he stopped work at three o'clock. He took the tram to Willis Street to see a doctor, who was not at his rooms, and then he took another tram from that doctor's rooms to the railway-station where he took a train to Khandallah, and on arrival there walked to his home. He said that ordinarily he took seven to eight minutes to walk from the station to his home, but on this occasion it took him an hour and a half. It was uphill, and he had to stop at intervals and take a rest. He would take a few steps, and then had to sit down. When he reached home he went to bed, the pain being still bad. He had Dr. Litchfield in to see him, who gave him a note to the hospital to be X-rayed. He stayed in bed and went to the hospital two days afterwards. At that time the pain was just the same. He went to town by bus and felt a little upset with the jolting, and so took a taxi from town up to the hospital. This was on Saturday, and the X-ray department at the hospital had a long waiting-list, and told him to come back in fourteen days' time. He went home, but returned to the hospital the following Monday as he was still suffering from the pain and wanted to get relief. He was told to go home and rest in bed for a week, and he went back to the hospital on May 13—that is, eight days after the alleged accident—and had not been able to do any work since that date. He was not paid any compensation and lived on social-security payments.

Shorland and Arndt, for the plaintiff.
Blundell, for the defendant.

Cur. adv. vult. 25

BLAIR, J. [After stating the facts, as above:] On his admission to the hospital, the plaintiff was apparently seen by a number of doctors. He complained of (i) pain on effort across the chest, down both arms and across shoulders; (ii) tightness across the upper abdomen; and (iii) weakness when pain commences.

Under the heading of "Present History" the note is—

Since after Christmas has had this pain on effort. This has gradually got worse since Christmas. There is no previous history of pain.

To questions put by another doctor, he stated:

Pain across the chest and down the arms on effort. Was loading 50 lb. boxes of butter when the pain (already present on and off since Christmas time) became severe and made walking home difficult. Has been in bed since this time. The pain is constricted across the chest. Tingling down arms. No palpitation. No dizzy feeling now, but when working when the pain came on he felt very dizzy and light headed.

A note on May 25 records that he was to get up, that his pulse was regular and no further pain. On June 9, it is recorded that the patient had been up and about for the past week, was feeling well and no pain to speak of.

Importance is attached, by the defence, to the fact that the claimant had pain in his chest on and off since Christmas time.

The plaintiff claims that the injury to his heart was caused by an undue strain when he was dragging the tray along the wharf into position alongside the chute. As will later be seen, when I come to discuss the medical evidence, it is common ground that he had some form of heart disease prior to the date of the alleged accident on May 5, 1943. The law, however, is clear that the fact that a workman was immediately prior to the accident suffering from some disease does not preclude him

from recovering compensation under the Workers' Compensation Act. If the plaintiff did sustain an "accident" arising "out of his employment," then it is not disputed that it was "in the course of" his employment.

- 5 Accordingly, therefore, my duty is to examine the authorities relating to cases where a workman already suffering from a disease has, by reason of an industrial accident, had that disease accelerated. The fact that at the time of the occurrence the workman was suffering from a bodily condition which made him most susceptible to injury from even moderate exertion will not prevent the occurrence being accidental. In 10 *Fenton v. Thorley*(1) "accident" is defined as "an unlooked for mishap "or an untoward event which is not expected or designed." All the Lords Justices in that case agreed in substance with that definition, and in *Clover, Clayton, and Co., Ltd. v. Hughes*(2), *Loreburn, L.C.*, said 15 that that definition was conclusive, and it is accordingly conclusive on all New Zealand Courts.

- In that case a workman was suffering from a serious aneurism, and when tightening a nut with a spanner, as part of his ordinary work, he suddenly fell down dead from rupture of the aneurism. It was held that 20 it was a case of "personal injury by accident arising out of and in the "course of his employment." The meaning the Lords Justices found that those words conveyed is clearly illustrated by the following passage from the judgment of *Loreburn, L.C.*: "The first question here is "whether or not the learned Judge was entitled to regard the rupture as 25 "an 'accident' within the meaning of this Act. In my opinion he was "so entitled. Certainly it was an 'untoward event.' It was not designed. "It was unexpected in what seems to me the relevant sense—namely, "that a sensible man who knew the nature of the work would not have "expected it. I cannot agree with the argument presented to your 30 "Lordships that you are to ask whether a doctor acquainted with the "man's condition would have expected it. Were that the right view "then it would not be an accident if a man very liable to fainting fits "fell in a faint from a ladder and hurt himself. No doubt the ordinary "accident is associated with something external; the bursting of a 35 "boiler, or an explosion in a mine, for example. But it may be merely "from the man's own miscalculation, such as tripping and falling. Or it "may be due both to internal and external conditions, as if a seaman "were to faint in the rigging and tumble into the sea. I think it may "also be something going wrong within the human frame itself, such as 40 "the straining of a muscle, or the breaking of a blood vessel. If that "occurred when he was lifting a weight it would be properly described "as an accident. So, I think, rupturing an aneurism when tightening a "nut with a spanner may be regarded as an accident. It cannot be dis- "puted that the fatal injury was in this case due to this accident, the 45 "rupture of the aneurism under the strain. That, of itself, does not "dispose of the case. It establishes that there may have been an injury "by accident caused to the workman. But it does not establish that "the accident was one 'arising out of the employment.' It is in these "words that the stress of the case mainly lies, as Mr. Simon in one passage 50 "of his argument partially indicated. When the man's condition was "such that he might have died in his sleep, and the mere tightening "the nut with no more strain than ordinary in such work caused the "accident, can it be said that the accident was one 'arising out of' the "employment? That seems to me to be the crucial point. I do not "think we should attach any importance to the fact that there was

(1) [1903] A.C. 443.

(2) [1910] A.C. 242.

"no strain or exertion out of the ordinary. It is found by the County Court Judge that the strain in fact caused the rupture, meaning, no doubt, that if it had not been for the strain, the rupture would not have occurred when it did. If the degree of exertion beyond what is usual had to be considered in these cases, there must be some standard of exertion, varying in every trade. Nor do I think we should attach any importance to the fact that this man's health was as described. If the state of his health had to be considered, there must be some standard of health, varying, I suppose, with men of different ages. An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of health. It may be said, and was said, that if the Act admits of a claim in the present case, every one whose disease kills him while he is at work will be entitled to compensation. I do not think so, and for this reason. It may be that the work has not, as a matter of substance, contributed to the accident, though in fact the accident happened while he was working. In each case the arbitrator ought to consider whether, in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone or from the disease and employment taken together, looking at it broadly? Looking at it broadly, I say, and free from over-nice conjectures: was it the disease that did it, or did the work he was doing help in any material degree?"(3).

A majority of the Court were of the same opinion as *Lord Loreburn*, and that judgment is recognized in the books as a binding authority. Shortly put, therefore, my duty is to make the inquiry which is prescribed in the last three sentences of the foregoing extract from *Lord Loreburn's* judgment.

The more recent case of *Moore v. Tredegar Iron and Coal Co., Ltd.*(4), is another one where a worker died as the result of doing his usual work, but work not heavier than he was occasionally required to do. The County Court Judge who tried the claim in the first instance disallowed it upon the ground that he was unable to find anything abnormal in the work which would be likely to cause or accelerate death. It was held that he had misdirected himself, and on the evidence that the work had accelerated death and there must be an award in favour of the widow. *Greer, L.J.*, said that if the deceased had not been working in the mine, and had not had the strain of his normal work, he would not have died when he did die, and would probably have died at a later age. He prefaced his judgment by indicating that to say that it was one arising under the Workmen's Compensation Act was tantamount to saying that it was a difficult case, and that remark is apt in this very case.

In order to apply the law as I have indicated in the foregoing to this particular case, I have to examine and pass upon a conflict of medical testimony upon a very difficult medical question.

The plaintiff's first witness was Dr. Williams, who gave *viva voce* evidence. After indicating that he had heard the plaintiff's evidence, he said:

I think that the *probable* explanation would be that as a result of the effort that Rowbottom made that day, especially the repeated effort, that his heart was called upon to do more work than could be compensated for by his coronary blood flow at that time. In other words, there was too heavy a demand by his heart

(3) [1910] A.C. 242, 245-247; 280, 281. (4) (1938) 31 B.W.C.C. 359.

muscles for blood. This demand was apparently repeated several times. The tendency under those circumstances would be for the process called infarction of his heart muscles to occur. . . .

I have italicized two words in the above quotation which indicate a selection by Dr. Williams of words not by any means confident. The effect of his evidence is that in his opinion the injury done to the plaintiff was caused by coronary occlusion brought about by "repeated and sustained effort." His view was that "the factor of repeated and sustained effort in this case must have had some causal bearing on the matter." The injury to the plaintiff is claimed to have been caused by such an effort on May 5, 1943. The work he did on that day was his ordinary work, which consisted of lifting butter-boxes weighing 56 lb. each off a chute alongside the loading-tray, and stacking such boxes three tiers high on such tray. There would be some interval then waiting for the empty tray to come back. When it did, the plaintiff and his mate then pulled the tray along the wharf, a distance of some 15 ft., until it was alongside the chute leading out of the railway-truck. As before indicated, that operation was thus no heavier than to lift a box containing 56 lb. of butter, but the plaintiff attributes his injury not to the lifting of the boxes of butter, but to the dragging of the empty tray into position. It will thus be seen that nothing more than ordinary effort was expended by the plaintiff and his work-mate on that particular day. He did precisely this work the whole of the previous day. I have not overlooked the fact that ordinary effort, if it causes "the accident," is sufficient, but I refer to what was the comparatively light nature of his work for the reason that it might have a possible bearing upon the nature or extent of the injury allegedly caused to the plaintiff's heart.

Dr. Williams's view as to the cause of the injury to the plaintiff is corroborated by a written report by Professor D'Ath. Incidentally the preface to Professor D'Ath's report indicates that the case as put to him was that the plaintiff had heart symptoms about a week previously, and that these symptoms had worked off. It is clear from the statements which the plaintiff made at the hospital when he was first examined that he had had several previous manifestations of angina pectoris. In this Court the plaintiff did not admit having mentioned this to the hospital doctors, but I am satisfied that they did not invent it, and the details given were obviously provided by the claimant.

On behalf of the defence, Doctors MacKay and Lynch gave *viva voce* evidence, and there is among the papers a diagnosis given by Dr. Burns, another heart specialist, who diagnosed the cause of the plaintiff's injury as coronary thrombosis.

Dr. MacKay was the doctor in charge of the plaintiff during his sojourn in hospital. Dr. Lynch is the pathologist for the Wellington Hospital, and both these experts strongly dissent from the view that the injury to the plaintiff's heart was the result of the effort as claimed by the plaintiff. All the four doctors agree that the electro-cardiographic picture indicates that Rowbottom was then suffering from an infarct. The point of divergence in the medical views centres around the cause of that infarct. The cardiograph does not help in diagnosis of the cause of the heart lesion. The defence doctors both strongly support the view that that infarct was the result of coronary atheroma followed by coronary occlusion (thrombosis) which is a gradual and apparently insidious disorder gradually blocking up the arteries of the heart, and that such a condition is unconnected with effort on the plaintiff's part. I was much helped in understanding the case by a diagram prepared by Dr. Lynch illustrating the

onset and progress of coronary atheroma, such diagram commencing with a plain section of a healthy artery, followed by diagrams showing the progress of the disease. Such diagrams much reminded one of an eclipse across the moon. The diagrams show that, after atheroma commences, it gradually increases thus reducing the bore of the artery with consequent reduction in the amount of blood which the artery can cope with. Dr. Lynch's diagram also indicates that on the surface of the atheroma what are called plaques are also formed. These plaques form a site upon which a thrombosis begins to form until ultimately the whole bore of the artery is occluded by it. Depending upon the extent of the blocking up of the artery, and commensurate therewith, there is a shortage of the blood supply to the heart, which, translated into medical terms, means that there is thus created a coronary insufficiency. The real dispute or divergence in the views of the experts for the plaintiff and for the defendant is that the plaintiff's doctors' view is that the plaintiff had coronary insufficiency precipitated by some factor that increases the work of the heart, or reduces the ordinary blood flow, which causes an infarction of the heart muscle without the presence of any thrombus in the artery. This inciting factor is suggested as being great emotion or effort. In other words, the plaintiff's experts say that the plaintiff never had thrombosis. The defence experts say that the blockage (thrombus) which interfered with the blood supply to the plaintiff's heart was due to thrombosis, an insidious disease of the arteries which is not related to external factors, and that effort plays no part in causing it. It is, so far as I understand the case, common ground that if the injury to the plaintiff's heart is due to thrombosis, then the claim must fail.

There is a long line of cases where it has been repeatedly held that injury due to coronary thrombosis is not injury arising out of the employment.

Dr. Lynch says :

In the case of Mr. Rowbottom I think it is clear that the atheroma of his coronary arteries had in December, 1942, reached a stage when there was coronary insufficiency. The beginnings of this are sometimes not appreciated by the patient. By reason of the fact that the pain is associated with a tightness in the chest which is relieved by alkali, it is often attributed to indigestion. When symptoms of angina of effort manifest themselves, the disease is already at any rate as far as one of the arteries is concerned, at an advanced stage, and under such circumstances thrombosis is likely to occur. The onset of that thrombosis may vary depending upon the rate at which clot formation occurs. If it occurs slowly, then the patient may suffer nothing more than a worsening of his angina of effort. In my opinion, this is what occurred in Mr. Rowbottom's case. The angina of effort which he suffered at his work on the morning of the 5th May was no more than an indication that his coronary vessels had narrowed to an extent in which efforts or exertion which left him unaffected the day before now caused him pain. That sudden change in his condition could be accounted for by the formation of a thrombus in much the same way as indicated in the diagram. This view is supported by the fact that when he became a hospital patient shortly afterwards and had an electrocardiograph taken, the appearances were those of an infarct of the heart. There seems to be no doubt that he did have an infarct and Dr. D'Ath in his report agrees that he had an infarct. My experience is that the vast majority of all infarcts of the heart are due to coronary thrombosis. I agree that under certain conditions mentioned by Dr. MacKay, infarction may occur in the absence of thrombosis. I think that is a very rare occurrence. It is also claimed that effort *per se* continued and persisted in in the face of coronary insufficiency may bring about infarction of the heart without thrombosis. Over a number of years I have examined very many cases of infarction of the heart—that is, cases that ended fatally. I cannot recall having encountered a case in which there was an infarct and no thrombus. With the exceptions I have mentioned as agreeing to, I do not think that infarction occurs apart from thrombosis. In the case of Mr. Rowbottom, I do not think the nature of the effort or the circumstances in which it was made were

of a character which would be likely to induce infarction of the heart. I agree with Dr. MacKay that angina of effort is a warning signal of nature and that unless some unusual circumstance of danger or emergency is an ingredient of the effort, that it is not likely to be persisted in to the extent of bringing about infarction. There is nothing in the medical history of this case which is inconsistent with the view that the ordinary sequence of changes that occur in coronary disease occurred in this case. Namely, that with narrowing of the arteries by atheroma a condition of coronary insufficiency was brought about, that thrombosis developed in the natural course of the disease, that the occlusion produced by the thrombosis became complete and infarction resulted. The infarct healed as healing usually does take place within a period of three to six months, and that the patient is then left with a heart damaged by scar and with a diminished capacity for effort. I defer to Dr. D'Ath's opinions, but I do not agree with his view that nearly one-half of all infarcts of the heart are due to causes other than coronary thrombosis. If the class of cases including debilitated persons is removed from consideration, then my view is that infarction without thrombosis scarcely ever occurs. I also do not agree with his view as to what influence immediate rest after the first attack of pain would have had on the development of the infarct. I think that once the process of thrombosis commences that nothing arrests the process. Whether it goes on to complete occlusion or not is purely a matter of chance, and is not related to what the patient is doing at the time. I think that it is possible that Dr. D'Ath's impressions of the chain of events in this case might have been modified had the full previous medical history as we now know it been known to him.

I accept that as being what must have occurred as far as the claimant is concerned. I think I should refer to the case of *Charlton v. Makara County*(5). That case is an authority which, although not binding upon another Judge of the Compensation Court, is one to which respect should be paid. It was a judgment of a former President of this Court, given in the exercise of a jurisdiction identical with the jurisdiction which I am now temporarily exercising. I had the advantage some years ago of acting for several months as President of the Arbitration Court when compensation cases were taken by that Court.

With the greatest respect to the late President of that Court, I say that when a compensation case is decided upon a question or questions of fact, as *Charlton v. Makara County Council* was, then the decision of a Judge on such a question is of little help in deciding another case depending also on questions of fact. The headnote of the case states that cases of heart disease heretofore described as coronary thrombosis should henceforth be divided into two classes—coronary occlusion and coronary insufficiency—the latter of which may be precipitated by effort or motion, and the clinical picture of which is different from that of coronary occlusion. That was the finding of the learned Judge, but it is obvious that such a finding means no more than that he has accepted the facts and opinions expressed by the doctors who gave evidence for the claimant in that case. Contrary opinions to that accepted by the learned Judge were given by the doctors for the defence in that case, and it may well be that as the result of research advances will be made and are being made, in relation to heart disease in all its forms, and the mere fact that the Judge who tried that case was satisfied with the evidence supporting one side of the case can have no real bearing upon what should be done in another case. *A fortiori* if important circumstances in the history of the cases differ in a material respect. In the *Charlton* case the claimant was required by certain damage to the roads which had occurred as the result of a storm, immediately and as a matter of special urgency, to go and remove an obstruction caused by some trees which had been blown down across the road. He procured two saws, one double-handled saw which was used by two other men, and he himself used a single-handled cross-cut saw to cut through a bough about 15 in. in diameter,

to do which he was obliged to assume an awkward position, crouching down and leaning more on the left than the right leg, and he was continuously so engaged from fifteen to twenty minutes. Once that was done, the plaintiff lifted the limb and removed it, after which he straightened himself into an upright attitude and was immediately seized with pain in the chest which completely disabled him. He was placed in the cab of a lorry and brought home as quickly as possible and was then seen by a doctor who administered morphia hypodermically. He was removed to hospital and so remained for eleven weeks, and having improved by that time was sent home. He went by taxi-cab, but the effort of walking up an incline to his house made him so unwell that he had to lie down in bed forthwith, where he had another "turn." Later on he went to the Home of Compassion, and remained there for six weeks; he again returned home and subsequently spent another fortnight there. At the time of the hearing he was still totally disabled and unable to lace his shoes. The learned Judge, assisted by a technical article which he had found, came to the conclusion that that case was one of coronary insufficiency, but he added that he could also find in favour of the claimant "on another ground, in that as the pain and disablement followed immediately on an effort of abnormal severity, the onus is thrown on the defendant to show that, had there been no effort, the crisis would have occurred at or about the same time" (6).

There is marked distinction between that case and this. In this case the history is that the plaintiff had several attacks of angina during the four or five months before the alleged accident, and it could not be successfully claimed that the effort he spoke of as having occurred on May 5 was one of "abnormal severity." The only effort deposed to in this case was that he was doing his ordinary normal work, which work was by no means of a strenuous character, and moreover the pain he felt on May 5, 1943, did not disable him altogether because he continued work with occasional spells for two hours, then had a spell for lunch and resumed again in the afternoon, working for another two hours, until he found himself unable any further to proceed. Charlton was totally incapacitated from the moment of the alleged accident.

For the foregoing reasons I hold that the plaintiff's claim must fail, and judgment will therefore be for the defendant company. Nothing was said to me on the subject of costs, and I will reserve leave to the defendant to apply for them.

Judgment for the defendant company.

Solicitors for the plaintiff: *Chapman, Tripp, Watson, James, and Co. (Wellington).*

Solicitors for the defendant: *Bell, Gully, Mackenzie, and Evans (Wellington).*

[IN THE MAGISTRATES' COURT.]

MARTIN v. LOWER HUTT CITY COUNCIL.

1945. November 15, December 12, before Mr. A. M. GOULDBING, S.M. (Chairman), and Mr. B. A. MAHONEY, member nominated by the appellant, and Mr. J. M. DALE, member nominated by the respondent, at Lower Hutt.

Municipal Corporation—Powers—Local Act authorizing Council to impose Conditions on Consent to Subdivision as to Drainage—Construction by Owner “of all public and private drains for the disposal of sewage . . . from the said land”—No power to compel Owner to construct Public Drain—Conditions imposed as to Sewage Drain unreasonable—Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), s. 5 (1)—Municipal Corporations Act, 1933, ss. 223, 229 (7), 239, 332.

Section 5 (1) of the Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), provides as follows: “The Council may, in consenting to any subdivision of land under section three hundred and thirty-two of the Municipal Corporations Act, 1933, impose such conditions as to the construction by the owners of the land of all public and private drains for the disposal of sewage and storm-water from the said land as the Council thinks fit.”

The Council sought to impose as a condition of its consent to a subdivision of the appellant's land fronting a public road that he pay half the cost of a sewer-drain extension along that road for a distance of 534 ft., at a cost of from £130 to £150. The subdivision comprised two sections.

Held, 1. That, under s. 223 of the Municipal Corporations Act, 1933, a distinction is made between public and private drains, but no specific power is given to compel a private owner to construct a public drain; and, assuming that, upon the subdivision of land by an owner who wishes to lay out and dedicate streets, he can be required to construct sewage drains, until they are taken over by the local authority they are not public drains.

Mayor, &c., of Lower Hutt v. Te Momi Land Co. ((1912) 15 G.L.R. 299) mentioned.

2. That the power conferred by s. 5 (1) of the Empowering Act, 1941, to attach conditions as to the construction by owners of land of “public drains” is inoperative in the absence of the power to compel the owner to construct a public drain; and the condition imposed by the Council was accordingly *ultra vires*.

MacFarlane v. Wellington City Corporation ((1945) 4 M.C.D. 416) referred to.

3. That, even if there were such power, it was unreasonable to compel the owner to contribute to the construction of 534 ft. of public-sewage drain, which would be used for carrying sewage from other lands as well as his.

APPEAL under s. 332 (3) of the Municipal Corporations Act, 1933, and s. 5 of the Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), against the decision of the respondent Council whereby it sought to impose as a condition of its consent to a subdivision of the appellant's land fronting the Main Western Hutt Road, Lower Hutt, that the appellant pay half the cost of a sewer-drain extension along the said Western Hutt Road for a distance of 534 ft. in a northerly direction from the termination of such sewer drain to a point opposite appellant's land. The cost to the respondent if he had to comply with the condition would be £130 to £150. The subdivision comprised two sections only. The Western Hutt Road had been a public street for years. The appellant was a ratepayer of the Corporation and included in his rates was a sum of between £2 and £3 per annum representing contributions upon special loans raised by the Corporation for drainage works.

The contention for the appellant was that the condition sought to be imposed by the Council was *ultra vires*, and was unfair and unreasonable. The Council said it was acting within its legal rights, and that its demand was *bona fide* and reasonable.

Kennard, for the appellant.

Gillespie, for the respondent Council.

Cur. adv. vult.

The judgment of the Board was delivered by GOULDING, S.M. Section 332 (3) of the Municipal Corporations Act, 1933, dealing with the powers of a municipal authority to place restrictions and conditions on the subdivision of land, so far as it is relevant, is to the following effect :—

“(3) In any such case the Council may—

“(c) Before approving the plan, or any plan submitted in substitution therefor, require the owner to make provision or further “or other provision for the construction of streets, or the “making of reserves, or require that the work of making all “new streets shown on the plan shall first be completed to “the satisfaction of the Council.”

Section 5 (1) of the Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), reads—

“5. (1) The Council may, in consenting to any subdivision of “land under section three hundred and thirty-two of the Municipal “Corporations Act, 1933, impose such conditions as to the construction by the owners of the land of all public and private drains “for the disposal of sewage and storm-water from the said land as “the Council thinks fit.”

Reliance was placed by counsel for appellant upon the case of *MacFarlane v. Wellington City Corporation* ((1945) 4 M.C.D. 416). In that case, upon appeal against the decision of the Wellington City Council seeking to compel an owner subdividing land to culvert an open watercourse, it was held that under provisions in the Wellington City Empowering and Amendment Act, 1929 (Local), almost exactly similar in wording to those in s. 5 (1) of the Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), there was no power in the Council to impose such a condition.

After citing *Maxwell on the Interpretation of Statutes*, 7th Ed. 257, 258, to the effect that enactments of a local or personal character are to be construed "more strictly than any other kind of contract," it was said "the Act empowers the Council to impose conditions with regard to drainage which will throw burdens on property owners. In accordance with the principles to be applied in construing such an Act, those powers ought not to be extended beyond the scope given by the Act itself."

The section in the Local Act now under consideration and s. 332 of the Municipal Corporations Act, 1933, and s. 125 of the Public Works Act, 1928, are all enactments *in pari materia* dealing with the subdivision of land. They must all be strictly construed: see *Casey v. Mayor, &c., of Palmerston North* ([1925] N.Z.L.R. 876), per *Reed, J.*: "A local body cannot arbitrarily refuse to accept the dedication of a road or street, nor can it impose conditions not authorized by statute" (*ibid.*, 880). "They are statutes which take away private existing rights; they impose new burdens on the private landowner and therefore it must be shown that any restriction or burden which it is claimed is imposed is within the very words of the statute used in their ordinary sense" (*ibid.*, 881).

Now what is it that s. 3 (1) of the Local Act empowers the Council to do? It may "impose such conditions as to the construction by the owner of the land of all public and private drains for the disposal of sewage . . . from the said land as the Council thinks fit."

There is a distinction between public and private drains. Section 223 of the Municipal Corporations Act, 1933, empowers a Council to construct (a) upon or under streets such drains "as the Council thinks needful for the efficient drainage of the borough," and (b) upon or under private lands "such drains as aforesaid." That such drains are public drains is clear from subs. (3) of the same section, which empowers the Council to "alter, renew, repair, and cleanse any public drain." So that there are public drains on streets and public drains through private property.

Owners can be compelled under s. 229 of the Municipal Corporations Act, 1933, to lay and construct private drains and to connect the same with public drains. Several owners can also be compelled jointly to construct and lay down private drains and to connect them with public drains. But by s. 229 (7), "No owner shall be required to construct any private drain to connect with any public drain at a point more than one hundred feet from his land."

There does not appear any specific power to compel a private owner to construct a public drain. There is power for a Council under s. 238 of the Municipal Corporations Act to declare a common private drain a public drain.

Doubt was expressed in *Mayor, &c., of Lower Hutt v. Te Momi Land Co.* ((1912) 15 G.L.R. 299) as to whether the word "drains" in s. 116 of the Public Works Act, 1908 (now s. 125 of the 1928 Act), included drains for carrying sewage though the question was not decided.

Assuming, however, that upon the subdivision of land by an owner who wishes to lay out and dedicate streets he can be required to construct sewage drains, until they are taken over by the local authority they are not public drains. The power given by s. 5 (1) of the Lower

Hutt City Empowering Act, 1941 (Local), giving the right to attach "conditions as to the construction by owners of land of public drains" is inoperative unless there is power to compel the owner to construct a public drain. There appears to be no such power.

We, therefore, think that there is no power in the Council to impose the condition that Martin construct or contribute to the cost of construction of the public drain on Western Hutt Road.

There appears yet another reason why the condition is bad. The subsection in question empowers the Council to impose conditions as to the construction of "drains for the disposal of sewage . . . from the said land." In our view, it is unreasonable even if there were power to compel Martin to contribute to the construction of 534 ft. of public-sewage drain when the drain would obviously be used for carrying sewage from other lands as well as his.

The appeal is allowed and the Board awards the appellant £8 8s. costs against the respondent Council—each party to pay the fee of its nominated member of the Board which is fixed at £5 5s.

Appeal allowed.

Solicitors for the appellant: *Luckie, Wiren, and Kennard* (Wellington).

Solicitors for the respondent Council: *Gillespie and Page* (Lower Hutt).

ORR v. McKNIGHT.

1945. November 12, December 3, before Mr. J. H. SALMON, S.M., at Wanganui.

Public Works—Removal of Gorse, &c., from Roads—Penal Consequences of Failure to comply with Order by Local Authority—"Land abutting upon any road"—Interpretation—Public Works Act, 1928, s. 170 (1) (2).

The words "abutting upon," as used in the expression "land abutting upon any road," in s. 170 (1) of the Public Works Act, 1928, which is a penal section, have the strictly limited meaning of "actually touching." They are inapt to describe land which is separated from a road by a stream, of which half the bed is vested in the Crown.

Barnett v. Covell (1903) 68 J.P. 93 followed.

Wakefield Local Board of Health v. Lee (1876) 1 Ex.D. 336 and *The King v. South Eastern Railway Co.* (1910) 74 J.P. 137, 336 explained and distinguished.

New Plymouth Borough v. Taranaki Electric-power Board ([1933] N.Z.L.R. 1128) and *Pitches v. Kinney* (1903) 22 N.Z.L.R. 818 applied.

INFORMATION by the County Council Clerk charging defendant with failure to comply with an order made in pursuance of s. 170 (1) of the Public Works Act, 1928, which provides that the local authority may

order the occupier, or in case there is no occupier, then the owner, of any land abutting upon any road under its control to cut down or grub up, as the local authority may direct, and remove all obstructions to traffic or drainage arising from the growth of plants upon such road, up to the middle-line of such road, along the whole frontage of the land occupied or owned by him. Subsection (2) of the same section provides certain penalties in the event of an occupier or owner failing to comply with such order within two months from the service thereof upon him. Section 171 makes provision for the form of notice of such order, and the service of such notice upon the occupier or owner.

The defendant was the occupier, under a lease from the Crown, dated April 1, 1920, granted under the Discharged Soldiers' Settlement Act, 1915, of certain lands in the Makirikiri Valley known as Section 4, Eaglesham Settlement, Block XV, Waipakura Survey District. The defendant's section was bounded upon its southern boundary by the Makirikiri Stream, and it was accepted that this stream is non-navigable and non-tidal. The Makirikiri Valley Road, a public road under the care and control of the Wanganui County Council, follows, roughly, the south bank of the Makirikiri Stream, and at some parts runs alongside the stream; at others, where the stream forms loops into defendant's land, the road leaves the stream and runs straight across, and then continues on alongside the bank of the stream. The lands within these loops, which were referred to as *peninsulae*, were not within defendant's boundaries, but were in the occupation of another, who was also the occupier of the land on the south side of the road, and who had his homestead on one of these *peninsulae*. Access to defendant's property was gained by a bridge over the stream at one point where the road runs near the bank of the stream. The defendant said that this bridge was put in shortly after he went on to the property. The learned Magistrate assumed that this bridge was under the control of the defendant, since it did not encroach upon the road, and gave access only to his property. There was no evidence as to whether a gate was maintained on defendant's side of the bridge.

On May 23, 1945, notice of the order by the local authority was served upon the defendant, requiring him to grub up and remove all obstructions to traffic and drainage from the growth of plants upon such road up to the middle-line along his frontage to this road. The engineer of the County Council gave evidence that he had inspected this part of the road a week prior to the hearing, and that defendant had not complied with the order.

Barton, for the informant.

Tizard, for the defendant.

Cur. adv. vult.

SALMON, S.M. [After stating the facts, as above:] At first sight it would appear only fair and reasonable that an occupier, whose lands lie adjacent to a public road, and who derives the benefits of access and use of that public road, should bear his share of the expense of keeping his half of such public road clear of gorse and other growths; but the facts and circumstances of the present case are unusual, and it must not be forgotten that we are called upon to interpret a highly penal section. It is only the occupier or owner of land *abutting upon* such road who is

within the statute. The neat question which has to be determined is whether land can be said to *abut upon* a road when it is separated from the road by a non-tidal and non-navigable stream, and has access to such road only by a bridge at one point.

Unfortunately, we have no direct authority in New Zealand, and the law in England cannot be regarded as satisfactorily settled, since the case which presents the closest similarity has been doubted and commented upon by several eminent Judges. Moreover, the English statutes, which the Courts in England have been called upon to interpret, have not been identical in terms, the statutes, in most cases, using alternative terms, or more than two, such as "forming," "fronting," "adjoining," or "abutting." Then again, the English authorities are, for the most part, concerned with questions of civil liability for expenses incurred under the Public Health Acts: *Wakefield Local Board v. Lee* (1876) 1 Ex.D. 336, *Lightbound v. Higher Bebington Local Board* (1885) 16 Q.B.D. 577, *London School Board v. Vestry of St. Mary, Islington* (1875) 1 Q.B.D. 65, *Baddeley v. Giggell* (1847) 1 Ex. Ch. 319; 154 E.R. 136, and other cases cited in 16 *Halsbury's Laws of England*, 2nd Ed. 419, para. 600, note (i).

There is also some difference as to the vesting of the *fee-simple* of the roads themselves. In England, in respect of some roads, the *fee-simple* of the soil of a road, *ad medium filum viae*, may be vested in the adjoining owner: 16 *Halsbury's Laws of England*, 2nd Ed. 242-248. In New Zealand, by virtue of s. 111 of the Public Works Act, 1928, the *fee-simple* of all public roads is vested in the Crown, and in counties the control and care of such roads are vested in the County Councils. In boroughs, however, all streets are vested in *fee-simple* in the Corporation of the borough: Municipal Corporations Act, 1933, s. 175, and *Thames Borough and Thames County v. Kauri Timber Co., Ltd.* ([1929] N.Z.L.R. 712).

The question arose, incidentally, as to where defendant's southern boundary falls. Defendant said in evidence that his fences were all inside his own boundaries on the north side of the stream. It is clear, however, that this is immaterial. He may have put his fences along the northern bank of the stream to prevent his stock from fording the stream and so trespassing upon the road, or upon his neighbour's property. The plan endorsed upon the lease shows that the lands are registered under the Land Transfer Act, and the southern boundary of defendant's land is shown as the Makirikiri Stream—not the northern bank, nor the southern bank, but the stream itself.

It was argued by Mr. Barton, for the informant, that the common-law rule, in cases where a grant or conveyance describes land as bounded by a non-tidal and non-navigable stream, is that the grantee takes *ad medium filum aquae*, unless there is something in the terms of the grant itself, or in the circumstances of the particular case, or in the existing legislation, to rebut that presumption: *The King v. Joyce* (1904) 25 N.Z.L.R. 78. The case of *Lord v. Commissioners for the City of Sydney* (1859) 12 Moo. P.C.C. 473; 14 E.R. 991 presented similar features to the present case. In *Mueller v. Taupiri Coal-mines, Ltd.* (1900) 20 N.Z.L.R. 89, Williams, J., discussing Lord's case, said: "In that case there had been a grant from the Crown of a "parcel of land described as bounded on one side by a small creek, it "was held that the grant extended to the centre of the creek, although

"the area and measurements described in the grant were satisfied irrespective of the half of the creek bed. The creek is stated in the case to have been an unnavigable stream of fresh water. It was held that the meaning of the words in the grant must be the same whether the grant is from the Crown or from a subject, and that the construction of the grant is always a question of intention to be collected from the surrounding circumstances. The judgment relied upon the fact that no reason could be assigned why the Crown should have reserved what might be directly or immediately useful to the grantee, and could scarcely have contemplated as of any probable use to the Crown . . . " (*ibid.*, 105). The effect of the provisions of the Land Transfer Act upon this common-law rule was discussed by Cooper, J., in *Strang v. Russell* (1905) 24 N.Z.L.R. 916). For the defendant, Mr. Tizard conceded that defendant's southern boundary probably was the centre-line of the stream, and I assume, for the purposes of the case, that defendant's southern boundary extends to the middle of the stream.

It was not contended that defendant is to be held responsible for not grubbing up and clearing gorse, &c., to the middle-line of the road in respect of those parts of the road which are opposite these *peninsulae*, which are occupied by a person other than the defendant. Such other person is the occupier of the land on both sides of the road, and his land abuts upon the road upon both sides. It is contended that the defendant is responsible only in respect of those portions of the road where the road runs adjacent to the stream opposite defendant's southern boundary.

Mr. Barton contended that, since half of the bed of the stream was vested in the defendant, the road and the defendant's property touch each other in the middle of the stream. This is not supported by the plan endorsed upon the lease. The road-line is shown as touching the bank of the stream in certain places, but nowhere does it encroach upon the stream. Indeed the road is formed to follow the valley rather than the stream, and is upon a different level. A view of the locality confirms the evidence afforded by the plan. The position, therefore, appears to be this: the road-line ends at the bank of the stream in some places, and there is still half the width of the stream before we come to defendant's boundary, *ad medium filum*. How then can defendant's land be said to abut upon the road if it abuts upon that half of the stream vested in the Crown? In other words, the defendant's land is separated from the road by Crown land represented by the bed of half the stream vested in the Crown.

It was further argued by Mr. Barton that if defendant's land did not abut upon this road the defendant could not obtain a title as it would be without a road frontage. He referred to s. 125 of the Public Works Act, 1928, and the use of the word "abutting" where it occurs therein: subs. (10). Section 125 is directed to the question of access to a public road, street, &c., and provides by subs. (1) that where the owner of land sells any part thereof not having a frontage to an existing road, he shall provide and dedicate a strip of land as a public road, street, &c., which will give access to such part from existing road, street, &c. "Sells" includes "leases." Subsection (7) provides that the Registrar shall refuse to register any instrument affecting the land unless and until he is satisfied that the owner has complied with the requirements of this

section. Subsection (10) provides that the foregoing provisions of this section shall not be deemed to prevent the registration of any transfer or conveyance of any allotment or subdivision of land abutting on any road or street of not less than sixty links shown upon any plan of subdivision deposited before October 20, 1900. I do not think that any point can be made of this old saving clause. It is true that in subs. (1) the Legislature has referred to lands not having a frontage to an existing road, and in subs. (10) it has referred to subdivisions of land abutting on any road. The authorities show that land may have a frontage to a road, and yet not abut upon it. No doubt in subs. (10) the word "abutting" is to be given its proper meaning. A stronger argument might have been founded upon s. 126 (2), where it is provided that for the purposes of that section any land which is separated from a public navigable river or lake or from the sea-shore only by a reserve in respect of which the public has unrestricted rights of ingress, egress, and regress shall be deemed to abut on such river, or lake, or on the sea-shore, as the case may be. This section has no application to the present case. It certainly points to a loose use of the word "abut," but the Legislature has gone out of its way to explain this loose application of the word to certain specific circumstances. Such an argument might prove to be double edged, since the maxim *Expressio unius exclusio alterius* would apply.

In the present case the statute uses the words "land abutting upon any road." The word "abut," according to the Imperial Dictionary, is from the French *aboutir*, to meet at the end, to border on, to be contiguous, to join at a border or boundary, to form a point or line of contact. Cf. French *à bout*. Sir Roland Burrows, K.C., in his recent work, *1 Words and Phrases Judicially Defined*, 73, 74, cites Lord Alverstone, L.C.J., as saying: "With reference to land, to 'abut' means 'to actually touch'—*Barnett v. Covell* ((1903) 68 J.P. 93, 94)—and Kennedy, L.J., as saying: "*Prima facie* at any rate, you ought to be careful to use the word [abut] in its proper sense, and 'abut' in its proper and etymological sense, and as frequently used, means actual touch. But I think, in this particular case, we must construe the word, which I think we are entitled to do, in conjunction with that, 'which alone, on the facts of the case, will give the word any meaning of any practical value.'" His Lordship then went on to hold, with the other members of the Court, that the company was estopped, by its negotiations with the local authority in connection with the bill, from denying that the land "abutted" on the road: *The King (on prosecution of Lewisham Borough Council) v. South Eastern Railway Co.* ((1910) 74 J.P. 137, 139). The same work, *1 Words and Phrases Judicially Defined*, discusses the words, "adjacent," "adjoining," and "contiguous."

The old leading case of *Wakefield Local Board of Health v. Lee* ((1876) 1 Ex.D. 336) was referred to by both sides. In that case the respondent's premises were separated from a street called Dyehouse Lane by a stream called the River Chald or Ings Beck. The stream was described as very small. The whole of the bed of the stream did not belong to respondents, and the evidence tended to show that the respondent's property did not extend further than the edge of the bank next to their land. Two bridges formed the means of communication between the respondents' premises and the street; one of them was of brick, but it was not

clearly proved to whom it belonged; the other bridge was of wood, and appeared to have belonged to the respondents, for they had removed it, and this act could only have been justified on the grounds of ownership. The respondents could, for all practical purposes, prevent any one from using the bridges without their consent. The principal outlet from the premises led into Westgate Street. The Public Health Act, 1848 (11 & 12 Vict., c. 63), s. 69, provided: "In case any present or future street or any part thereof (not being a highway) be not sewered, levelled, paved, flagged, and channelled to the satisfaction of the local Board of Health, such Board may, by notice in writing to the respective owners or occupiers of the premises fronting, adjoining, or abutting upon such parts thereof as may require to be sewered, levelled, paved, flagged, or channelled require them to sewer, level, pave, flag, or channel the same within a time to be specified in such notice." The respondents had not complied with a notice to carry out certain works within the time fixed, and the Board executed the works mentioned, and thereafter proceeded to recover a proportion of such expenses in a summary manner as prescribed by the section. The Justices dismissed the complaint. Upon appeal, *Groves and Field, JJ.*, held that respondents' premises fronted and abutted upon Dyehouse Lane. The judgment is that of *Groves, J.*, who specifically stated that *Field, J.*, concurred, "although he may not fully agree with all my reasons." Reading the judgment of *Groves, J.*, it is, I think, clear that he was influenced by the consideration of access, the presence of the bridges, the fact that respondents' premises had access to Dyehouse Lane. *Cleasby, B.*, after citing the facts above mentioned, said: "Upon these facts we have to determine whether the respondents are liable to pay the amount claimed from them. I do not consider the words used in the statute synonymous; I think that they were carefully inserted, and that they have distinctive meanings. I think that the respondents' premises do not 'abut' upon Dyehouse Lane, because the stream intervenes between them, and I do not think that the bridges make any difference as to this. I may remark that if respondents' premises do either front, adjoin, or abut upon Dyehouse Lane, they will not be exempt from liability upon the ground that for practical purposes they gain no benefit from their proximity to the lane . . . I hardly think that upon the facts stated the respondents' premises fronted the lane. The most important word is 'adjoining.' Now it seems to me that, as the stream is very small, the premises are not really separated from the lane, and may be said to adjoin . . ." (*ibid.*, 341, 342).

Before we pass on to consider the cases in which the decision of *Groves and Field, JJ.*, has been criticized, while that of *Cleasby, B.*, has been approved, there is one point which must always be borne in mind—namely, that the Court of Appeal in that case was not interpreting a penal section. It was construing the statute for the purposes of civil proceedings to recover a proportion of the expenses of executing the works. This point emerges in the judgments in *Lightbound v. Higher Bebington Local Board* ((1885) 53 L.T. 812). In that case, which was also a case under the Public Health Act, 1875, the premises consisting of land and cottages built thereon were separated from a street by a wall, which, with the land on which it stood, belonged to another owner. The only access from the cottages to the street was by going along a public footpath through an opening in the wall, or by

going round the end of the wall. It was held that the cottages were not premises "fronting," "adjoining," or "abutting" on the street within the meaning of s. 150. *Lord Esher*, M.R., pointed out that the cottages did not front, did not adjoin, and did not abut on the street in the ordinary sense, for they did not touch the street, being separated from it by a wall belonging to a different owner, but that this circumstance was not necessarily conclusive. The largest rule laid down by *Sir Alexander Cockburn*, L.C.J., in *London School Board v. Vestry of St. Mary, Islington* ((1875) 1 Q.B.D. 65), being that, although houses do not touch the street, if there is access which gives them the advantages of abutting on the street, they might be rateable ((1885) 53 L.T. 812, 813). *Bowen*, L.J., said: "I agree that, in order to come within the words 'fronting, adjoining, or abutting' on the street, the premises need not 'touch the street. The decision in *Wakefield Local Board v. Lee* (1 Ex.D. 336) shows that this is so. We must look at the subject-matter of the 'section and see what the scope and object of the Act is. It seems to me that it was intended to charge those persons who benefit by the 'works executed by the local Board. Here I cannot say that the 'cottages front or abut on the street. It is not necessary to decide, 'but I am inclined to prefer the opinion of *Cleasby*, B., to that of *Grove*, 'J., in *Wakefield Local Board v. Lee* (1 Ex.D. 336). It seems to me 'that to have the benefit of access is not the same as to adjoin; but it 'it is an important element for consideration, for if the houses get a 'substantial advantage from the works executed in the street, that 'may possibly make them adjoin the street within the meaning of 'the statute, although they do not actually touch it. Here I cannot 'say that the houses adjoin the street' (*ibid.*, 813).

In *London County Council v. Collins* ((1905) 93 L.T. 540) *Lord Alverstone*, L.C.J., found it unnecessary to express an opinion as to whether the factory might be held to front, adjoin, or abut upon the street. The case is of no assistance upon the present question, but for the remarks of *Ridley*, J., upon the judgments in *Wakefield Local Board v. Lee*. He said: "It is true that they came to that conclusion, 'but, speaking personally, to my own thinking the reasoning of 'Cleasby, B., upon the word 'abutting' is the more convincing and the 'more accurate. There was, in that case, merely a small stream 'between the premises in question and the land upon which it was said 'to abut, and there were three bridges across it. He said that in his 'view the premises did not, in those circumstances, abut upon the land; 'they adjoined it. I think you can use the word 'adjoining' as 'meaning that it would include such a case as that, but 'abutting' 'I should have thought you could not, and I find there is good authority 'for the distinction in the judgment of *Bowen*, L.J., in the case of *Lightbound v. Higher Bebington Local Board* (53 L.T. (N.S.) 812). I think, 'therefore, if this question should arise again upon what is to be the 'proper meaning of the words 'abutting upon,' there will be some 'reason for reconsidering the decisions of the past, and perhaps some 'difficulty in arriving at the proper interpretation which is to be put 'upon the words. I should rather not express a final opinion upon 'that point, because I think it must depend upon the circumstances 'of each particular case, at all events in the larger proportion of cases' (*ibid.*, 545, 546).

Mr. Barton, for the informant, relied upon the later case of *The King (Lewisham Borough Council) v. South Eastern Railway Co.* ((1910)

74 J.P. 137). Unfortunately, the reports are not available, and we have been compelled to rely upon the abbreviated report in *Mew's Annual Digest*, 1910, 310. In that case a railway Act provided that, in the event of the railway company acquiring any land abutting upon a certain road, they would widen the road. The company, under the powers of that Act, acquired land separated from the road by a small stream, and the local authority gave notice that the road was to be widened. The railway company denied liability on the ground that the land in fact acquired did not "abut" on the road by reason of the existence of the stream. The case is of no assistance, because the *ratio decidendi* proceeded upon estoppel. *Ridley, J.*, the Judge of first instance, held that the expression "land abutting on" the road was ambiguous. There was clear evidence that the conduct of the company in the negotiations with the local authorities had been such as to induce their representatives to believe that the obligation to widen the road would attach if the company acquired the lands which they had, in fact, acquired, and the company was estopped from saying that the land did not "abut upon" the road within the meaning of the clause. On appeal, the Court of Appeal affirmed the judgment of *Ridley, J.*

There are just two comments which I desire to make upon this case. The first is that *Ridley, J.*, if called upon to decide whether, notwithstanding the presence of the intervening stream, the land "abutted upon" the road, would no doubt have expressed the same view which he expressed in *London County Council v. Collins* ((1905) 93 L.T. 540, 545, 555), when he approved the reasoning of *Cleasby, B.*, in *Wakefield Local Board v. Lee* ((1876) 1 Ex.D. 336). The second comment is that *Ridley, J.*, declared that the expression "land abutting on" the road was ambiguous. Again, I would point out that the present section under which this Court is asked to convict is a highly penal one, and a conviction cannot be founded upon an ambiguity.

In *New Plymouth Borough v. Taranaki Electric-power Board* ([1933] N.Z.L.R. 1128), *Lord Macmillan* said: "But as *Lord Hewart, C.J.*, said in a recent case, where the question was as to the meaning of the word 'contiguous' (*Spillers Ltd. v. Cardiff (Borough) Assessment Committee* ([1931] 2 K.B. 21, 43): 'It ought to be the rule, and we are glad to think that it is the rule, that words are used in an Act of Parliament correctly and exactly, and not loosely and inexactly. Upon those who assert that that rule has been broken the burden of establishing that proposition lies heavily. And they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred'" (*ibid.*, 1129, l. 36; 1130, l. 2). In *Pitches v. Kinney* ((1903) 22 N.Z.L.R. 518) *Williams, J.*, said: "As was said by *Lord Watson* in *Salomon v. Salomon and Co.* ((1897) A.C. 22, 38): "'Intention of the Legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of law or equity, what the Legislature intended to be done or not can only be legitimately ascertained from that which it has chosen to enact, either by express words or by reasonable and necessary implication." . . . The section, however, in the present case is penal. It imposes a duty and inflicts a penalty for the non-

"performance of that duty. . . . It would be unjust that a man should be punished for not doing a thing unless the statute makes it reasonably clear that it was his duty to do it. Nor would it be a 'fair' interpretation of a statute to hold that the case was within the statute because the Legislature probably would have included it if it had been brought to their notice" (*ibid.*, 819, 820).

It seems to me that the Legislature, in using the words "abutting upon," has used an expression which is inflexible, and inapt in the existing circumstances. The weight of authority is in favour of the view that the expression has a strictly limited meaning and application, and in construing a penal section it is the duty of the Court to interpret the expression in accordance with that strictly limited meaning. Any loose and inexact meaning is not to be preferred.

I was, at one stage, concerned by the presence of this private bridge over the stream, giving defendant's land access from the road, and whether defendant's land might not be said to abut upon the road at that point, at least, but this is clearly answered in the judgment of *Cleasby, B.*, above referred to (*Wakefield Local Board v. Lee*, (1876) 1 Ex.D. 336), where he said: "I think that the respondent's premises do not 'abut upon' Dyehouse Lane, because the stream intervenes between them, and I do not think the bridges make any difference as to this" (*ibid.*, 341, 342).

I think the information must be dismissed.

Information dismissed.

Solicitors for the plaintiff: *Armstrong, Barton, and Armstrong* (Wanganui).

Solicitors for the defendant: *Christie, Craigmyle, and Tizard* (Wanganui).

[IN THE COURT OF APPEAL.]

NELSON HOSPITAL BOARD *v.* COOK.

COURT OF APPEAL. Wellington. 1946. March 6, April 17. SIR MICHAEL MYERS, C.J.; BLAIR, J.; KENNEDY, J.; CALLAN, J.

Hospitals and Charitable Institutions—Limitation of Action—Board's Liability for Acts done by Persons not engaged in Professional or some Analogous Capacity—Notice of Action—Application of Ejusdem generis Rule—"Or other person"—Hospitals and Charitable Institutions Amendment Act, 1936, s. 2.

Section 2 of the Hospitals and Charitable Institutions Amendment Act, 1936, has relation only to such persons as are employed or engaged by a Hospital Board in the capacity of "medical practitioner, dentist, matron, nurse, "midwife, or attendant," or in some analogous capacity—namely, persons who in the course of their duty come into immediate contact with patients and are in some way associated with the treatment of patients.

Sluggish River Drainage Board v. Oroua Drainage Board(1) applied.

Auckland Hospital and Charitable Aid Board v. Lovett(2) and *Logan v. Waitaki Hospital Board*(3) referred to.

(1) (1944) 5 N.Z.L.G.R. 122.

(3) [1935] N.Z.L.R. 385.

(2) (1892) 10 N.Z.L.R. 597.

So held, by the Court of Appeal, affirming the judgment of *Finlay, J.*, reported [1945] N.Z.L.R. 110.

Quaere, per *Myers, C.J.*, Whether the action was one for damages for breach of contract; and, if so, whether s. 2 of the Hospitals and Charitable Institutions Amendment Act, 1936, applied.

Vincent v. Tauranga Electric-power Board(4) referred to.

(4) [1933] N.Z.L.R. 902; aff. on app. (1936) 1 N.Z.L.G.R. 403.

APPEAL from the judgment, reported (1945) 5 N.Z.L.G.R. 207.

Fell, for the appellant.

Cleary and Arndt, for the respondent.

Cur. adv. vult.

5 MYERS, C.J. I am clearly of the opinion that this appeal fails.

It is certainly arguable, I think, and perhaps more than arguable, that the action is one for damages for breach of contract. If it is such an action, then s. 2 of the Hospitals and Charitable Institutions Amendment Act, 1936, would probably have no application: the period of
10 limitation would presumably be the ordinary period of six years. I say this because s. 2 of the Act would seem to be applicable only to actions in tort. The case is different from *Vincent v. Tauranga Electric-power Board*(1). In that case the reason why it was held that the cause of action said to be based upon an implied breach of contract was barred was that, however the action might be framed, the substance of what
15 was complained of was the breach of a statutory duty, or, as their Lordships in the Privy Council said, "something done or omitted to be done" in the execution or intended execution of the Act "within the meaning of the limitation provision (s. 127) of the Electric-power Boards Act, 1925. That section therefore applied, and the whole action was out of
20 time. Here, if it can be said that the cause of action is really breach of contract, the substance of the complaint is a breach of a duty imposed either by contract or by the common law relating to such a contract, and not a breach of any statutory duty.

But I prefer not to base my judgment upon that ground or even to
25 express any opinion as to its validity, first, because, although the matter was adverted to during the course of the argument, it cannot be said to have been fully argued; and, secondly, because, dealing with the action as one in tort (and it was mainly upon that basis that the argument was conducted), the appellant Board, in my opinion, cannot
30 succeed.

We have not in New Zealand any general statutory provision for the protection of local authorities and persons acting in the execution of statutory and other public duties such as is contained in the Public Authorities Protection Act, 1893, of the Parliament of the United
35 Kingdom. Nor, prior to the Amendment Act of 1936, was there any such provision included in any of the Acts relating to hospitals and their administration limiting the time and mode of the commencement of an action against a Hospital Board or any officer or person acting in the execution of his statutory or public duties. It is perhaps strange that
40 there should have been no provision in these Acts, seeing that there always has been a provision of the kind in respect of the activities of every other public body that one can think of—for example, a municipal Corporation or an Electric-power Board. It is to be noted that where the Legislature has intended, as in the case of the two classes of

(1) [1933] N.Z.L.R. 902; aff. on app. (1936) 1 N.Z.L.G.R. 403.

local bodies just referred to, to give a general protection, it does so in the widest possible terms: see s. 361 of the Municipal Corporations Act, 1933, and s. 127 of the Electric-power Boards Act, 1925, which fell for construction in *Vincent v. Tauranga Electric-power Board*.

The protection afforded in the Municipal Corporations Act extends not only to the Corporation or Council and every member or officer of the Council or of any committee appointed by the Council, but to any other person (which, of course, means every person) acting under the authority or in the execution or intended execution or in pursuance of the Act or any other Act for any alleged irregularity or trespass or nuisance or negligence or any act or omission whatever. The protection clause in the Electric-power Boards Act is in similar language. Section 2 of the Hospitals and Charitable Institutions Amendment Act, 1936, is quite different. It refers only to cases "where damage is suffered by any person as a result of any wilful or negligent act or omission of any medical practitioner, dentist, matron, nurse, midwife, attendant, or other person employed or engaged (whether in an honorary capacity or otherwise) by any Board, and acting in the course of his or her employment or engagement." Subsection 1 purports to confer upon the person injured a right of action against the Board, and subs. 2 limits the period within which such an action may be commenced. It seems to me that if it had been intended to give by subs. 2 the general protection contended for by the appellant, or rather to limit the period within which any action of tort against the Board, however arising, could be commenced, such general protection or limitation might be reasonably expected to be enacted in similar language to that used in enactments relating to other local bodies where a general protection or limitation was clearly intended. The appellant's contention, of course, fails if subs. 1 is to be read in accordance with the *ejusdem generis* rule. The learned Judge in the Court below has held that that rule applies, and, in my opinion, he is right in so holding. I ventured in my judgment in *Sluggish River Drainage Board v. Oroua Drainage Board*(2) to cite and apply the only two authorities which I think need to be considered now—namely, *National Association of Local Government Officers v. Bolton Corporation*(3) and *Knight and McLennan v. National Mortgage and Agency Co.*(4)—for, in my view, the position in this case is exactly the same as in the *Sluggish River* case(5). We have in subs. 1 now under consideration an enumeration of persons who, in my opinion, are all comprehended in one genus or category—that is to say, a category of persons who are all associated with the treatment of hospital patients—but the enumeration is not exhaustive of the category, inasmuch as a radiographer or a masseur (and probably others) would come within it. It seems to me that what the subsection contemplates is the relationship between the patient in a hospital and the various classes of persons under whose care he may come for treatment, and, in my opinion, Mr. Cleary is right in his submission that where the subsection refers to damage suffered by any person it refers really to damage suffered by a person undergoing treatment in the hospital. Unless the *ejusdem generis* rule applies, an action by any person walking in the hospital grounds, whether a patient, visitor, or tradesman having business there, for damage in respect of injury suffered by reason of the negligence of a gardener, or a general labourer employed by the hospital

(2) (1944) 5 N.Z.L.G.R. 122.

(4) [1920] N.Z.L.R. 748.

(3) [1943] A.C. 166; [1942] 2 All E.R.

(5) (1944) 5 N.Z.L.G.R. 122.

dropping tools while working on the roof, would come within the purview of the section. Such a construction would seriously curtail the rights of persons who, quite irrespective of the Act of 1936, would have had a cause of action against a Hospital Board to which the general period of limitation would apply. Such rights should not be held to be taken away or limited except by reasonably plain language.

I do not propose to discuss in detail the history which would seem to account for the enactment of 1936, but it is not inappropriate to say that reference to the observations made in *Auckland Hospital and Charitable Aid Board v. Lovett*(6) and *Logan v. Waitaki Hospital Board*(7) would seem strongly to support the view that I have expressed. The real intention of the Legislature in passing s. 2 of the Act was, as it appears to me, to confer a right of action where such a right did not previously exist or at all events where its existence might have been open to doubt, and to limit the period in which in such cases an action may be commenced. In other words, it either gave a new right of action or affirmed the existence of a doubtful right, but cannot be assumed to have been intended to interfere with any recognized existing rights of action or to abridge the period within which any such right might be exercised. Before the 1936 Amendment Act was passed, it cannot be said to have been free from doubt (until the matter had been finally settled by the House of Lords or the Privy Council) whether, for the purpose of giving rights of action to persons suffering damage by the negligence of any of the classes of persons enumerated in subs. 1 of s. 2, any person in the enumerated classes was to be regarded as a servant of the Board, and the effect of the enactment is really to place them in the category of servants for that purpose.

The construction of subs. 1 is the only question before us on this appeal, and admittedly, if the *ejusdem generis* rule is applicable, the appeal cannot succeed. Agreeing as I do with the view of the learned Judge in the Court below, that, on their true construction, the words "or other person" in the subsection must be construed as being *ejusdem generis*, the appeal, in my opinion, must be dismissed.

BLAIR, J. I agree that this appeal must be dismissed. I concur with the judgment of the learned Judge of the Court below, and have nothing to add to it.

KENNEDY, J. In view of the restricted language of s. 2 of the Hospitals and Charitable Institutions Amendment Act, 1936, it is impossible to conclude that the statute imposed a limitation upon all actions against Boards where the cause of accident was some wilful or negligent act or omission of any person employed or engaged by it. I think, for reasons which were elaborated by *Finlay, J.*, that he quite correctly held that the Legislature in s. 2 was dealing with certain classes of wrongdoers only, and that the words "or other person employed or engaged" (whether in any honorary capacity or otherwise by any Board) must be read *ejusdem generis*. The alternative construction would greatly increase the area of responsibility of Boards and put them in an unfavourable position as compared with other persons whereas they had previously been in a privileged position and it would also, at the same time, restrict the remedies of persons whose rights had previously been undoubted and theretofore had been subject to no such limitation. This would require words clearer and more definite than those that

(6) (1892) 10 N.Z.L.R. 597.

(7) [1935] N.Z.L.R. 385.

appear in the section. The debate in *Logan v. Waitaki Hospital Board*(1) was as to the extent of the privileged position of a Board. The Hospitals and Charitable Institutions Amendment Act, 1936, was passed shortly after this decision. I infer from this and from the language of s. 2 that the amendment was primarily intended to remove from Boards the privilege, which they had hitherto enjoyed or which it might reasonably be contended that they enjoyed, in being free from the rule of vicarious liability where the wrongful acts were those of a person exercising professional skill in relation to a patient. The enumeration in s. 2 does show, however, that the Legislature went beyond that, and to that extent the section confirms liability where it was previously generally believed liability existed. The statute did all this by imposing upon the Board liability for the wilful acts or omissions of the persons enumerated or of persons in like position as if they were the servants of the Board acting in the course of their employment. I agree for these reasons that the appeal should be dismissed.

CALLAN, J. I have had the advantage of reading the judgments prepared by the Chief Justice and *Kennedy, J.* I agree with them that the conclusion reached by *Finlay, J.*, in the Court below is right, and that the appeal should be dismissed. In view of the full discussion of the matter which is on record in the judgments of these learned Judges, I content myself with saying that, in my opinion, it is clear (i) that the *ejusdem generis* rule must be applied in the interpretation of s. 2 of the Hospitals and Charitable Institutions Amendment Act, 1936, and the operation of that section must be limited to cases where damage is suffered by any person as the result of any wilful or negligent act or omission of any medical practitioner, dentist, matron, nurse, midwife, attendant, or other person employed or engaged in an analogous capacity to those persons enumerated; (ii) that the analogy required is that such "other person" should, like those enumerated, be a person having hospital patients in his or her care, and that the only acts or omissions which are within the section are acts or omissions directly connected with the care of patients.

Any further definition of the relationship between a patient and such "other person" which must exist if the section is applicable need not be attempted, because, in this case, the plaintiff was not a patient, but a nurse.

Appeal dismissed.

Solicitors for the appellant: *Fell and Harley* (Nelson).

Solicitors for the respondent: *O'Donovan and Arndt* (Wellington).

(1) [1935] N.Z.L.R. 385.

[IN THE SUPREME COURT.]

REDDECLIFFE v. NORTH CANTERBURY
HOSPITAL BOARD.SUPREME COURT. Christchurch. 1945. August 6, 7, 8, 9. NORTHCROFT,
J.

Hospitals and Charitable Institutions—Limitation of Action—Board's Liability for Negligence of Members of its Professional Staff—Commencement of Action—Action not commenced within Six Months after Date of Act complained of—Whether in Circumstances Plaintiff had "reasonable cause" for Delay—"Reasonable cause"—Hospitals and Charitable Institutions Amendment Act, 1936, s. 2.

The plaintiff attended the defendant Board's hospital at Christchurch and had X-ray therapy for a wart or corn on the sole of the right foot. This treatment was prescribed by Dr. Fenwick in charge of the radiological department; and it was administered by H., a technician of the department, who was not a qualified man and had no academic or professional qualifications of any sort. The foot became sore and a blister developed. She returned to the hospital, and was told by H. that the treatment was going on satisfactorily. Thereafter, the condition subsided; but, two years later, she bruised the damaged area, which became intensely painful, attended the hospital where she was treated again, and it was arranged with the approval of H. that she should be treated by a general practitioner near her father's home at Rakaiia. He had eventually to refer her to Dr. Allison, a specialist and consultant of the department, who diagnosed her condition as an X-ray ulcer, arising from an excessive application of X-rays. Eventually, after endeavouring to cure the ulcer, he advised a skin-graft, which was undertaken at a plastic surgery unit conducted by the defendant Board. On June 1, 1944, he informed the hospital of the fact. In August, the defendant knew of the possibility of litigation. On October 2, 1944, an arrangement was made between the parties to permit further treatment of the plaintiff unprejudiced by litigation, that the action need not be commenced immediately, and that date was to be regarded as the date on which the action had notionally commenced.

The plaintiff brought an action against the defendant Board for negligent treatment causing the X-ray burn and the jury found for her and awarded her damages. The defendant Board pleaded a special defence based upon s. 2 (2) of the Hospitals and Charitable Institutions Amendment Act, 1936, that the action had not been commenced within six months of the act or omission complained of. The plaintiff submitted that she had "reasonable cause" for the delay.

Held, That, although the tortious act was committed on December 8, 1941, the plaintiff did not suspect and had no cause to suspect the act was tortious until Dr. Allison's diagnosis on May 31, 1944, that her condition was due to an ulcer arising from X-ray treatment, and he had informed the hospital of that fact on June 1; that the plaintiff could not be held responsible for not having taken action earlier than May 31, 1944, in that from May to September remedial measures were being taken, which might have obviated the necessity for action; that it was not unreasonable in the circumstances to delay action until the hoped for cure, especially as the hospital staff knew of the condition and of Dr. Allison's charge of the case; and that, accordingly, there was "reasonable cause" for the delay, by which the defendant was not prejudiced.

ACTION claiming damages for negligent treatment of the plaintiff at the defendant Board's hospital. The jury returned a verdict for the plaintiff and awarded her damages.

T. A. Gresson and Gough, for the plaintiff.

G. G. Watson and Perry, for the defendant.

A. C. Perry, for the defendant Board. In view of the terms of s. 2 (2) of the Hospitals and Charitable Institutions Amendment Act, 1936, *prima facie* the plaintiff is out of time. Treatment was concluded on

December 8, 1941, but the action was not commenced until October 2, 1944, because on that date it was agreed that time should not count further against plaintiff as discussions going on as to the plaintiff's further treatment. The effect of that agreement was that the action should be deemed to have been commenced on the latter date. Notice of intention to commence action was given on November 11, 1944.

The onus of showing why the action was late and that there was reasonable cause for extension of time is on plaintiff: *Roberts v. Crystal Palace Football Club, Ltd.*(1).

T. A. Gresson, for the plaintiff. Section 2 (2) of the Hospitals and Charitable Institutions Amendment Act, 1936, stipulates that actions against Hospital Boards shall be commenced within six months after the date of the act or omission complained of and not afterwards, unless in the opinion of the Court the delay has been occasioned by mistake, absence from New Zealand, or any other reasonable cause. This statute cleared up certain doubts which had previously existed concerning Hospital Boards' liability for the acts of doctors, nurses, &c., and the object of the time-limit was no doubt to suppress fraudulent or stale claims from springing up at great distances of time, and surprising the parties when all proper evidence has been lost or the facts have become obscure from the lapse of time or the defective memory or death or removal of witnesses. In other words, there must be no delay prejudicial to Hospital Boards. The question whether the facts as found amount to "reasonable cause" is one of law and the particular facts and circumstances of each individual case must be considered.

As to what may constitute "reasonable cause," see *Macdonald's Workers' Compensation in New Zealand*, 2nd Ed. 539 *et seq.*, where the meaning of the words "reasonable cause" within s. 27 of the Workers' Compensation Act, 1922, is fully discussed. The following grounds have been upheld as constituting "reasonable cause": (a) Reasonable belief that the condition would improve; (b) the fact that the injury did not become apparent until after the expiration of the time-limit; (c) uncertainty of the exact nature of the injury; (d) the fact that the plaintiff was in hospital and unable to transact business; and (e) estoppel by the other party's conduct—*e.g.*, a false promise to pay, &c.

The treatment in this case took place in December, 1941, and the reason why the plaintiff did not make her claim within six months thereafter—*i.e.*, by June, 1942—was because Mr. Hines of the X-ray therapy department had told her "she was doing all right" and that he was pleased with her; and further because the serious nature of her injury had not become apparent by then.

No question of delay can possibly arise until the plaintiff was informed for the first time that she had an X-ray burn when she saw Dr. Allison at Dr. Candy's request at the end of May, 1944. She had reported back to the X-ray department at the Christchurch Public Hospital in February, 1944; and, from that date onwards, the Board was in full possession of the facts; and therefore no question of prejudice arose.

The evidence establishes that under treatment Dr. Allison, over a period of four or five months, almost succeeded in healing the ulcer without the necessity of surgical interference; but that, as soon as the plaintiff's parents knew that their daughter was to enter Burwood Hospital for skin-graft involving three or four surgical operations, they

(1) (1909) 3 B.W.C.C. 51, 52.

consulted their solicitor at once, and a formal claim was made on the Board on September 11. In these circumstances, there is "reasonable excuse" for any delay which has occurred, and such delay has in no way prejudiced the defendant Board.

- 5 *Perry*, in reply. The onus has not been discharged: see *McKenzie v. The King*(2). In England, as the cases show, notice is required in time, but here and in the statute under consideration the commencement of the action is the important date. Here, the plaintiff put up with inconvenience and pain for two years after treatment. If delay is to be excused, then it can only be allowed if claim brought as soon as possible after six months. After February 28, the plaintiff's condition was serious and known to be serious. On seeing Dr. Allison on May 31, she was told that her condition was due to X-ray treatment; but no action was taken until the notice of claim in the following
- 10 September.

- 15 A delay of seven weeks is unreasonable: *Milligan v. Young Men's Christian Association*(3), adopted in *Wilson v. Gannaway and Co., Ltd.*(4), *Cross v. Cole*(5), *Cairns v. Kaitangata Coal Co., Ltd.*(6), *Shotts Iron Co., Ltd. v. Fordyce*(7), and *Atherton v. Chorley Colliery Co.*(8). The purpose
- 20 of the subsection is to give protection to Hospital Boards.

- NORTHCROFT, J. (orally). As the jury has found for the plaintiff it becomes necessary to decide whether this action is out of time having regard to s. 2 (2) of the Hospitals and Charitable Institutions Amendment Act, 1936. That section provides that "every such action shall be
- 25 "commenced within six months after the date of the act or omission "complained of, and not afterwards, unless, in the opinion of the Court, "the failure to commence the action within the time hereby limited "was occasioned by mistake, or by absence from New Zealand, or by "any other reasonable cause." This action was not commenced within
- 30 six months; but the plaintiff claims that there is reasonable cause which should save her from the operation of that subsection.

- The date of the tortious act was December 8, 1941. By agreement between the parties, although the action was not commenced then, October 2, 1944, is to be regarded as the date upon which the action
- 35 was notionally commenced. Upon that date, according to the correspondence and the admissions of counsel, an arrangement was made, to permit further treatment of the plaintiff unprejudiced by litigation, that the action need not be commenced immediately. The matter will be considered, then, as if the action had been commenced on
- 40 October 2, 1944.

- The relevant facts are that before the X-ray treatment complained of the plaintiff had been a patient of the outpatients' department at the hospital and was referred by that department to the X-ray therapy department for this treatment. The treatment was given on December
- 45 8, 1941, at a time when the patient had no medical adviser other than those in the employ of the defendant Board. The plaintiff again visited the X-ray therapy department three weeks after the treatment. At that time she and her mother were worried about the development of a blister. They were sent away without treatment. The plaintiff

(2) [1922] G.L.R. 157.

(3) [1930] G.L.R. 613, 615.

(4) [1932] N.Z.L.R. 843, 860.

(5) [1931] N.Z.L.R. 1588.

(6) [1936] G.L.R. 291.

(7) [1930] A.C. 503, 508; 22 B.W.C.C. 911.

(8) (1926) 19 B.W.C.C. 314, 319.

says she was told that it was "doing splendidly." The case note kept by Mr. Hines was merely "Sharp reaction, corn disintegrating." Being reassured, the plaintiff took no steps to relieve the pain and discomfort arising from the treatment. It subsided some time later. Thereafter she continued to go about more or less normally. She left school, but lived at home. She had some limitation of activity because of the formation of a scaly condition over the area treated, with which was associated a discharge. This, one of the witnesses said, indicated an incomplete healing. Early in 1944 the place started to become painful again, and on February 25, while hurrying across the railway-line near her home, she bruised the sore place which then became very painful. On February 28 she again attended at the hospital because of this painful development. She again went to the X-ray therapy department whence she was referred to the outpatients' department. There she was given ointment to apply. She was also given crutches and a bed-boot. Soon after she became the patient of Dr. Candy of Rakaiā. The evidence shows that Mr. Hines of the X-ray department was told that this was contemplated because Dr. Candy lived near her father's farm and it was difficult and inconvenient for the plaintiff to be brought into town. That, according to the evidence, was approved by Mr. Hines. While she was under Dr. Candy's care he endeavoured to reduce the ulcer which had formed. As I understand his evidence, he did not regard it as an X-ray ulcer, but as an infected sore arising from a bruise at the railway-station. Dr. Candy was unable to reduce the ulcer, which was resistant to treatment, so at the end of May he referred it to Dr. Allison, a specialist in diseases of the skin. Now, for the first time, it was diagnosed as an ulcer arising from X-ray treatment. Dr. Allison, on June 1, informed the hospital of this fact. There is a note made by Mr. Hines in the case notes that Dr. Allison reported that the plaintiff had been brought to see him, that she had an ulcer at the site of the treatment due, in Dr. Allison's opinion, to X-ray treatment. At this point of time, then, not only were the patient and her parents informed of the true position, but the hospital also was informed that the patient was now in Dr. Allison's care and suffering from an X-ray ulcer. At this stage Dr. Allison, although not permanently on the staff of the hospital, was employed there in a consultative capacity. Now there is fixed for the first time a knowledge on the part of the plaintiff or her parents as at the end of May or beginning of June, 1944, that the plaintiff had an X-ray ulcer arising from treatment given in December, 1941. Thereafter Dr. Allison endeavoured to cure the ulcer, had some measure of success, but finally, probably about August or September, came to the conclusion that it would not yield completely to the treatment and that a skin-graft was necessary. Then, as the father of the plaintiff says, when he heard that the matter was of such gravity as to require an operation for skin-graft, he thought it necessary to do something to protect his daughter's legal rights. He consulted his solicitor, who immediately wrote to the defendant Board, and the correspondence ensued which has just now been put in.

These are the circumstances in which I am asked by the plaintiff to hold that there has been reasonable cause for the failure to take action sooner than was done. The Act, it is true, does for the first time extend the rights of patients in hospitals, or at any rate it does resolve a doubt about their rights. I agree with counsel that the period of limitation in respect of such actions is intended for the protection

of hospitals. No doubt it is to prevent stale actions being brought, to the prejudice of the hospital, in circumstances which would make it difficult for the hospital through lapse of time dissipating evidence which might have otherwise been available.

- 5 My attention has been drawn to a number of cases under the Workers' Compensation Act in which there is a section very similar to this. Too close a reliance upon the analogy of that section and of the cases decided upon it may lead to error. Under the Workers' Compensation Act it is the fact of injury which gives rise to a claim, whereas under this
- 10 Act it is the fact of a tortious act or omission, not injury alone, which justifies the action against the Hospital Board. There must be many cases where injury—grave injury—results from treatment at the hospital due to no negligence at all. This may be the inevitable consequence of treatment, however skilful, or may be the result of accident in no way
- 15 attributable to negligence. Under the Workers' Compensation Act, on the other hand, if a man is injured, the Act requires him to take steps within the prescribed time so that the employer may take steps to meet the claim, or at any rate to have it investigated. If a workman suffers an injury such as would normally give rise to a claim, he usually
- 20 knows of it. Consequently he is at a greater difficulty in justifying delay than a claimant under the Hospitals and Charitable Institutions Amendment Act, 1936, who, knowing of the injury, may not have immediate knowledge of negligence which would justify legal proceedings.

- Coming then, to a consideration of the facts here, the plaintiff now
- 25 claims that a tortious act was committed in December, 1941. She says, and I find it as a fact, that she did not suspect the act was tortious until she was advised by Dr. Allison on May 31, 1944, that the injuries from which she had been suffering arose from an excessive application of X-ray. Both before and after the X-ray burn she had been the
- 30 patient of the Hospital Board in its various departments. She had been seen by the X-ray therapy department and by the outpatients' department after the burn, and she had not been told anything which would justify the view that the painful consequences of her treatment were other than normal, or if abnormal were other than accidental. It
- 35 is true that between March and May, 1944, she was in the hands of Dr. Candy with, so her father says, the knowledge and approval of the Hospital Board. Dr. Candy, as I have already mentioned, did not diagnose the condition as an X-ray ulcer, but thought it was an infectious ulcer arising from a bruise. In my view, then, the plaintiff could not
- 40 be held responsible for not having taken action earlier than May 31, 1944, when she was told by Dr. Allison of the real cause of her misfortunes. Dr. Allison, thereafter, attempted to improve the condition, and apparently had some degree of success, but eventually came to the conclusion that a skin-graft was necessary. Upon the plaintiff's father
- 45 being informed of this he decided that action should be taken. Notice was then given. The period of which I think the defendant can properly complain, if at all, is between May, 1944, and September, 1944. In respect of that period neither prejudice, nor harm, nor unfairness can be done to the defendant Board by allowing the action to go forward,
- 50 because during that period the hospital knew of it and had all the information necessary. Dr. Allison, although at this time the medical attendant of the plaintiff, was in some measure employed by the Hospital Board as their consultant, and it is to him they would have referred for information upon it. The case note of August 22 and Mr. Hines's
- 55 evidence upon it shows the defendant knew then of possible litigation.

In these circumstances, then, I am satisfied the Hospital Board was not prejudiced by the delay, and I am of opinion there was reasonable cause for the delay. From May to September remedial measures were being taken. Had these prevailed an action might not have been instituted. In any event it was not unreasonable in the circumstances to delay action until the hoped for cure, especially as the hospital staff knew of the condition and of Dr. Allison's charge of the case.

I think the special defence based upon s. 2 (2) of the Act of 1936 must fail.

Solicitors for the plaintiff: *Wynn Williams, Brown, and Gresson* (Christchurch).

Solicitors for the defendant: *Chapman, Tripp, Watson, James, and Co.* (Wellington).

WATERS v. MANAWATU-OROUA ELECTRIC-POWER BOARD.

SUPREME COURT. Palmerston North. 1945. November 9, 10. BLAIR, J.

Master and Servant—Electric-power Board—Contract of Service with Electrical Engineer—Restoration of Salary after Retrenchment—Effect of Statutory Restoration of Rate of Remuneration—Limitation of Action against Power Board—Whether applicable to Contracts of Service—"Contract of Service"—Finance Act, 1936, s. 17—Statutes Amendment Act, 1936, s. 28—Industrial Conciliation and Arbitration Act, 1925, s. 146—Electric-power Boards Act, 1925, s. 127.

Section 17 (4) of the Finance Act, 1936, is permissive only, and does not provide the only remedy a person working under a contract of service may have.

Baillie and Co. v. Reece(1) followed.

Section 146 (4) of the Industrial Conciliation and Arbitration Act, 1925, as amended by s. 27 of the Industrial Conciliation and Arbitration Amendment Act, 1936, applies to wages payable by virtue of awards or industrial agreements, and not to what are designated "contracts of service" by s. 17 of the Finance Act, 1936.

Section 127 of the Electric-power Boards Act, 1927, which requires notice of intention to commence an action against an Electric-power Board within six months next after the cause of action first arose, whether the cause of action is continuing or not, applies only to a breach of statutory duty on the Board's part, and, therefore, to a claim under s. 17 of the Finance Act, 1936, to recover the underpaid amount of salary under a statutory contract created by that section.

Vincent v. Tauranga Electric-power Board(2) followed.

(1) (1906) 26 N.Z.L.R. 451.

(2) (1936) 1 N.Z.L.G.R. 403.

ACTION claiming balance of salary alleged to be due to the plaintiff, an electrical engineer resident in Palmerston North. The defendant, the Electric-power Board constituted under the Electric-power Boards Act, 1925, of the Manawatu-Oroua Electric-power Board district, in the year 1922 appointed the plaintiff its electrical engineer. He continued to hold this position until his services were dispensed with as from October 15, 1945.

The plaintiff's commencing remuneration was £941, being salary at £850 per annum, and a free house at an annual value of £91. Later on, this house-allowance was merged in the salary. That was the position 10 as at July 1, 1936, which, as hereinafter appears, is a crucial date so far as this case is concerned.

On that date he still occupied the same position with the defendant Board, but his salary had been reduced down to £500 per annum. These reductions in salary were for retrenchment reasons, and several, and it may be all, of the staff were proportionately reduced by reason of a financial depression that had occurred. After that position improved, the salaries were increased by instalments as the Board's position improved. Its operations in six years prior to 1936 had resulted in a loss, but thence onwards its operations produced gradually improving and substantial profits. The plaintiff had not, by the date his employment terminated, been fully restored in salary; but it had reached £721 per annum.

The plaintiff gave formal evidence; the defence called none.

A. M. Ongley, for the plaintiff.

Cooper, for the defendant.

Cur. adv. vult.

BLAIR, J. [After stating the facts, as above:] Under Part II of the Finance Act, 1936, certain provisions are made in s. 17 thereof, requiring that as from the date of the passing of that Act (July 31, 1936) any person

employed under a contract of service to which this section applies was on the thirty-first day of March, nineteen hundred and thirty-one, employed by the same employer in work of the same kind or of substantially the same kind, his rate of remuneration, if less than the rate payable as at the thirty-first day of March, nineteen hundred and thirty-one, shall, on the commencement of this Part of this Act, be restored to the rate payable on the said thirty-first day of March, nineteen hundred and thirty-one.

If that section applies, it is not in dispute that the plaintiff's salary has been so reduced as to give him a claim under the section, but this is, of course, subject to certain technical defences raised.

I do not propose to check the figures in the claim. The relevant dates and the amounts of the reductions made are not in dispute, and if I come to the conclusion the plaintiff is entitled to succeed, I will leave it to the parties, or in default of their agreement to the Registrar, to ascertain the amount, if any, payable to the plaintiff. He claims the sum of £2,659.

There is no definition in the statute of the words "*employed under a contract of service*," but even if those words did not cover the plaintiff's position (as in my view they do), then s. 28 of the Statutes Amendment Act, 1936, allays all possible doubts on the point.

During the argument, counsel stated that the plaintiff was the only employee of the Board who was not restored to his proper salary pursuant to s. 17 of the Finance Act, 1936.

The plaintiff submitted that s. 17 creates a statutory contract under which he is entitled to recover the underpaid amount of salary in the appropriate Court. The defendant claims that subs. 4 of s. 17, which provides that if the worker is paid less than he should be after the statute becomes operative, he may recover the amount as if it were payable under an award, is the only remedy available to the plaintiff. I think the statute does create a statutory contract, but that s. 17 (4) is permissive only, and does not provide the only remedy the plaintiff may have. *Baillie and Co. v. Reese*(1) is, I think, authority for what I say as to that.

The defendant pleads that the plaintiff, ever since reduction was made in his salary, has accepted the amount so paid, and has given full discharges for the same. The plaintiff gave evidence, but was not cross-examined and nothing was said upon this topic at all. I presume he would give some sort of receipt for whatever he was paid, but it may be taken, I think, that the defendant has nothing from the plaintiff which can be construed as a discharge of all its statutory liability to the plaintiff. If such existed, it would have been produced. I can see no evidence in the case to justify the view that there has been any waiver on the plaintiff's part.

The further technical defence has been pleaded that s. 17 of the Finance Act, 1936, and s. 146 (4) of the Industrial Conciliation and Arbitration Act, 1925 (as amended by s. 27 of the Industrial Conciliation and Arbitration Amendment Act, 1936), bar the plaintiff's claim except as to the amount therein provided.

I have already dealt with s. 17. Section 146 of the Industrial Conciliation and Arbitration Act, 1925 (as amended), provides that where any payment of wages has been made to and accepted by a worker at a less rate than that which is fixed by any award or industrial agreement, no action shall be brought by the worker against his employer to recover the difference between the wages so actually paid and the wages legally payable save within twelve months after the day on which the wages claimed in the action became due and payable. My view is that that provision applies only to wages payable by virtue of awards or industrial agreements, and not to what are designated as contracts or service under s. 17.

Another point taken by the defence is that s. 127 of the Electric-power Boards Act, 1927, bars the plaintiff's claim. That section requires notice of intention to commence action against Electric-power Boards within six months next after the cause of action first arose "whether the cause of action is continuing or not." The section requires such a notice in respect of claims arising from

the execution or intended execution, or in pursuance of this Act, for any alleged irregularity, or trespass, or nuisance, or negligence, or for any act or omission whatever . . .

Notice of action was on September 10, 1945, given by the plaintiff through his solicitor to the Board, but in the pleadings he does not admit the necessity for notice.

Section 127 was discussed in *Vincent v. Tauranga Electric-power Board*(2), a decision of the Privy Council on appeal from New Zealand. The claim in that case was for damages to a workman employed by the Power Board, and was based on negligence, and was commenced twenty-two months after the injury was suffered by the plaintiff. In the Supreme Court, *Smith, J.*, held that in so far as his claim rested on the Board's omission to fulfil a statutory duty, s. 127 was a complete bar, but that if at the trial the plaintiff could succeed in establishing the implied contract pleaded by him, then that section would not operate as a bar.

The Privy Council held that, whether framed in tort or an implied contract, the plaintiff's claim was barred.

The claim in this case is based upon breach of statutory duty on the Board's part, and that, in my view, brings this case within the limitation imposed by s. 127 of the Electric-power Boards Act. Accordingly, there-

(2) [1936] 1 N.Z.L.G.R. 403.

fore, I hold that except in respect of any breach of duty which was committed by the Board within six months prior to giving by the plaintiff of the notice of action, the plaintiff's claim is barred. The plaintiff's employment by the Board ceased as from October 15, 1945, so that his claim would be limited to any shortage of salary for the period of six months prior to that date. That brings us back to April 15, 1945. From that date the plaintiff received salary at £708 15s. instead of at £941 per annum, to the time that his employment ceased, the underpayment thus being at the rate of £233 per annum for six months.

10 It is not necessary for me to consider the further defence based upon the Statute of Limitations.

There will therefore be judgment for the plaintiff for £116 10s., with costs on the lowest scale and with Court disbursements only.

Judgment for the plaintiff accordingly.

Solicitor for the plaintiff: *A. M. Ongley* (Palmerston North).

Solicitors for the defendant: *Innes and Oakley* (Palmerston North).

VANCE AND VANCE v. HASTINGS BOROUGH.

1945. July 17, August 3, before Mr. J. MILLER, S.M., at Hastings.

War Emergency Legislation—Emergency Shelter Regulations—Compensation to Owners or Occupiers of Land used for Air-raid Shelters—Extent of Liability of Local Authority—"Loss or damage"—"Suffers"—Emergency Shelter Regulations, 1942 (Serial No. 1942/1), Reg. 13 (1).

The compensation payable to owners or occupiers of land under Reg. 13 (1) of the Emergency Shelter Regulations, 1942, for the use and occupation by a local authority of land upon which an air-raid shelter has been constructed, is limited in extent, and is confined to the incidents set out in the regulations, and does not extend to other incidents which might have been available at common law, or include mere deprivation of land without proof of actual loss and damage.

ACTION claiming compensation under the Emergency Shelter Regulations, 1942 (Serial No. 1942/1).

The defendants, in pursuance of Reg. 10, constructed air-raid shelters upon a vacant section of land situate at the corner of Nelson and Eastbourne Streets in the Borough of Hastings and owned by the plaintiffs. The defendants used and occupied the said land from March 15, 1942, to November 30, 1944.

The plaintiffs were deprived of the use, occupation, and enjoyment of the said piece of land, and they stated that they had been prejudiced in their efforts to sell the land.

The rates and penalties incurred during the said period amounted to the sum of £44 17s. 8d., which was the sum claimed in the action as compensation.

Hallett, for the plaintiffs.

Bate, for the defendant.

Cur. adv. vult.

MILLER, S.M. [After stating the facts, as above:] Regulation 13 (1) of the Emergency Shelter Regulations, 1942, provides—

“Where any owner or occupier of any premises suffers any loss or damage by the exercise of any local authority . . . in respect of those premises . . . of any of the powers conferred by this Part of these regulations, he shall be entitled to receive such compensation (whether by way of rent or otherwise) as may be reasonable.”

Mr. *Bate* submits that actual loss or damage must be proved. Mr. *Hallett* submits that the actual occupation depriving the owner of the use of the land entitles the owner to some compensation without proof of actual loss or damage, because the plaintiffs have been deprived of the use and of the opportunity to dispose of the land; and he further submits, if there is a doubt about the basis of compensation, judgment should be given in equity and good conscience.

I do not think that I have power to give judgment on the grounds of equity and good conscience, because the action is based upon a statutory provision which provides for compensation only on proof of loss or damage suffered.

In any case, although this claim is for less than the sum of £50, it means more than £50 to the defendants for upon the plaintiff's success other claims will likely follow. It is also pointed out by Mr. *Bate* that other claims may be in excess of £50 resulting in adverse judgments, thus creating injustices.

The evidence on commission of the Wellington City Treasurer has rightly been objected to. He stated that in twelve cases the Wellington City Council paid rent to the owners of vacant lands used for public air-raid shelters, mostly based on the amounts of rates. In the case before me, actual loss has not been proved. It was not stated whether the Wellington owners had incurred actual loss, except in three cases where there were losses of rent. If the basis of compensation was potential loss to the Wellington owners, the position there is different. In the crowded Wellington positions where shelters were erected on the vacant sections of land, there would be a much greater potential loss than at Hastings. If, in a Wellington case, the loss was so likely that the local authority decided to grant compensation, it does not follow that another local authority should take this as a guide and grant compensation when the loss is only remote. No suggestion has been made how the Wellington evidence applies. This is the interpretation of a statutory regulation. An analogy cannot be drawn from the interpretation of a written business contract from the usage of trade. In any case, it lacks the fundamentals—in particular, notoriety.

As this was intended to be only a temporary use, the decisions on compensation under the Public Works Act, 1908, are not helpful. There has been no actual loss or damage incurred by the plaintiffs. The land was vacated in good condition. It has been vacant, and not used for many years. The land was purchased by the plaintiffs in the year 1936 with the intention of building flats. The plaintiffs admit that there have been no offers to purchase, but land agents wanted authorities to sell. They further admit that there has been no loss other than the payment of rates. They were bound to pay the rates. If they can show that they could and would have sold the land if it had not been taken over,

the payment of rates minus the penalty might be considered as compensation for their loss provided such a loss can be considered. I shall refer to this later. As they say they suffered no loss, it is clear that they did not intend to build flats within the near future after the land was taken by the defendant. Moreover, the intention to build flats has been held in abeyance from the year 1936 to the present time. Furthermore, up to the present time, they have made no effort to sell or let and have declined assistance from land agents. It seems that this is just vacant land lying idle for a period of nine years—namely, from the date of purchase, 1936.

Mr. Wilkinson, land agent, says that during the period of existence of air-raid shelters there was little demand for vacant land such as this but at present there is.

It is clear there was no actual loss, and it appears to me that actual loss must be proved as the word "suffers" is used in Reg. 13. Notwithstanding this, Mr. *Hallett* submits that the mere temporarily possessing the vacant land for the purpose of the regulations entitles the owner to some compensation. I think that if the Legislature intended this, Reg. 13 (1) would definitely contain such a provision. The likelihood of a prospective buyer would not have been overlooked. It appears to me that Reg. 13 (1) is so worded to exclude Mr. *Hallett's* submission. In the wording of the regulation, where an owner or occupier of any premises suffers loss or damage, the word "damage" must mean actual damage. Why should the word "loss" have another meaning? The meaning can be gathered from other provisions of the regulations. Regulation 18 of the main regulations provides for the hearing of "Claims for compensation and claims for increases and decreases of rent."

There are two classes of shelters—namely, "Public Shelters" (see Part III of the regulations), and "Shelters for Business Premises" (see Part IV of the regulations, added by Reg. 5 of Amendment No. 1 (Serial No. 1942/92).)

The provision for compensation referred to in Reg. 18 covers both classes of shelters, but is available only to a limited degree in reference to business shelters. Instances in the latter cases are—

(1) Where additional shelter is made for workers or residents of neighbouring business premises, the responsible authority shall pay the owner compensation as assessed by the regulations: see Reg. 16. This is compensation for a loss.

(2) Where works are executed by the owner of any business premises in any part thereof of which he is not the occupier, the occupier of that part of the premises is entitled to recover from the owner compensation for any damage he has sustained by reason of any interference of his use of that part of the premises during the execution of the work . . . : see Reg. 17B (1) (added by Reg. 5 of Amendment No. 1 (Serial No. 1942/92)). Compensation is made by decreasing the rent.

(3) The "increases of rent" referred to in Reg. 18 of the main regulations provide a means of paying compensation. The costs of the works so far as business premises shelters are concerned are borne by the owners. The occupiers, lessees, and tenants contribute by paying increased rents: see Reg. 17B (4).

(4) A lessee or tenant, who has suffered damage by reason of his or his predecessor's inability to appeal, is entitled to a reduction of the

increase in rent (already granted) : see Reg. 18 (3). The words used in Reg. 17B (1) are "damage he has sustained," and in Reg. 18 (3) (added by Reg. 7 of Amendment No. 1) are "suffered damage."

The fixing of the increases or decreases of rents are confined to present incidents as set out—some actual loss or damage must be present.

In most cases, the difference between a public shelter on a vacant section of land and a business shelter was that the whole of the land was temporarily taken for a public shelter but only part of the business premises was taken. The expenses of the work are borne by the responsible authority in the former case and subject to contribution by the owner in the latter case.

So far as a public shelter is concerned, it is difficult to conceive any loss or damage in the case of idle vacant land returned in good condition. There would be in the case of demolition, alteration, &c., of any building for the purpose of constructing a public shelter, but in this case compensation is provided for loss : see Regs. 8 (1) and 13.

If the plaintiffs contemplated a sale, they could have appealed on the grounds of hardship : see Reg. 7 (1).

The regulations authorize the responsible authority to pay owners or occupiers compensation. But this compensation is limited in extent and is confined to the incidents set out and not to other incidents which might be available at common law. It does not include mere deprivation of land without proof of actual loss or damage.

"Debts created by statute take their form and incidents from "the provisions of the particular statute upon which they are founded" : *Leake on Contracts*, 8th Ed. 108.

The plaintiffs have failed to prove that they are entitled to compensation under the regulations.

Judgment will be entered for the defendant with costs.

Judgment for the defendant.

Solicitors for the plaintiffs : *Hallett and O'Dowd* (Hastings).

Solicitors for the defendant : *Simpson and Bate* (Hastings).

INSPECTOR OF SCAFFOLDING *v.* RUSH.

1946. April 5, 10, before Mr. A. M. GOULDING, S.M., at Wellington.

Scaffolding and Excavation—Building Work—Provisions of prescribed Rail for Working Platform—Nature of Contractor's Liability—Contractor providing Materials for same and directing its Erection—Rail not Erected—Person committing Offence—Scaffolding and Excavation Act, 1922, s. 12—Scaffolding Regulations, 1935 (1935 New Zealand Gazette, 3337), Reg. 22 (5).

The effect of s. 12 (a) (b) and s. 14 (1) (e) of the Scaffolding and Excavation Act, 1922, is that, while in the first instance an information may properly be laid against either the owner of the building or the person in charge for a breach of Reg. 22 (5) of the Scaffolding Regulations, 1935 (for failure to provide to a working platform 15 ft. above the ground level a rail 3 in. by 2 in.), it is open to the person so charged to show, in fact, that he was not the person in charge. In other words, the liability of the contractor is not an absolute liability; and it is open to him to show that he had provided the necessary material and directed a responsible person to erect it. If that person fails to carry out the contractor's instructions, then it is he, and not the contractor, who commits the offence.

INFORMATION charging the defendant, a contracting painter, with a breach of the Scaffolding Regulations, 1935 (1935 *New Zealand Gazette*, 3337), Reg. 22 (5), in failing to provide to a working platform 15 ft. above ground level a rail 3 in. by 2 in., as required by the regulation.

The defendant supplied the necessary scaffolding material and directed his foreman, one Rowse, to erect it in accordance with the regulations. Rowse, who gave evidence, admitted that that was so, and that he did not put the scaffolding up on the particular job where he should have done so. Mr. Rush left the supervision of the job to his foreman. He himself had a number of jobs in hand.

Inspector of Scaffolding, informant, in person.
Defendant, in person.

Cur. adv. vult.

GOULDING, S.M. I am satisfied upon the construction of certain sections in the Scaffolding and Excavation Act, 1922, that the prosecution cannot succeed. Section 12 of the Act provides that where any person is charged with an offence the following provisions shall apply:—

“(a) On the information of the defendant, made before the charge against himself is disposed of, any other person whom he alleges to be the actual offender may be brought before the Magistrate on the same charge, and, to enable both charges to be heard together, the charges against the defendant may be adjourned for such time as the Magistrate thinks reasonable.

“(b) If the charges are heard together and the offence is proved, but the Magistrate finds that it was committed in fact by the said other person without the knowledge, consent, or connivance of the

"defendant, and, further, that the defendant had done all that could reasonably be expected of him to prevent the offence then the said other person shall be deemed liable, and shall be convicted, and not the defendant."

Section 14 (1) (e) provides—

"(e) It shall lie on the defendant to bring himself under exemption, proviso, excuse, or qualifications, and it shall not be necessary to negative the same in the information."

Regulation 2 of the Scaffolding Regulations, 1935 *New Zealand Gazette*, 3337, defines "'owner or person in charge' as meaning the person having control or management of any building work or scaffolding or excavation and includes a foreman or other person having delegated control or management."

Reading the portions of ss. 12 and 14 from the Act which I have quoted, it appears plain that, while in the first instance the Inspector has a right to lay an information against either the owner of the building or the person in charge, it is open to a defendant so charged to show that in fact he was not the person in charge. In other words, the liability of the contractor, in a case such as the present, is not an absolute liability. It is open to him to show, as Mr. Rush has shown, that he provided the material and directed a responsible servant to erect it. If that person fails to carry out instructions, my view is that he is the person who commits the offence and not the contractor.

The information is dismissed.

Information dismissed.

MANAWATU-OROUA ELECTRIC-POWER BOARD v. WATERS.

1946. April 16, 30, before Mr. C. C. MARSACK, S.M., at Palmerston North.

Rent Restriction—Electric-power Board—Engineer's Residence—Employment Terminated—Engineer remaining as Board's Tenant—Whether such Tenancy within Fair Rents Legislation—Electric-power Boards Act, 1925, ss. 93, 122—Fair Rents Act, 1936, s. 13—Finance Act, 1937, s. 63—Fair Rents Amendment Act, 1942, s. 3.

A dwellinghouse, purchased by an Electric-power Board as its engineer's residence with the approval of the Minister of Public Works, in accordance with s. 15 of the Electric-power Boards Act, 1925, was let to the Board's engineer at a weekly rental. After his employment was terminated in October, 1945, the engineer remained in the dwelling as the Board's tenant and continued to pay rent.

On February 15, 1946, the Board gave the tenant one month's written notice to quit, on the ground that the dwellinghouse was required for the occupation of the new engineer. The tenant did not vacate the premises, and the Board asked for an order for possession.

Held, 1. That the original letting of the Board's engineer complied with the provisions of the Electric-power Boards Act, 1925; and, at the time of the passing of s. 3 of the Fair Rents Amendment Act, 1942 (applying the principal Act to every dwellinghouse then or thereafter let as a dwellinghouse), became subject to the fair rents legislation.

2. That, at the termination of the engineer's employment, an order for possession could be made only in pursuance of s. 13 of the Fair Rents Act, 1936, and s. 63 of the Finance Act, 1937; and the Board had not proved the necessary facts to be established thereunder before an order for possession could be made.

3. That the consent of the Minister of Public Works had not been obtained pursuant to s. 122 (3) of the Electric-power Boards Act, 1925, to the continuation of the tenancy after the ending of the engineer's employment; and the Board could not deprive the tenant of the protection of the Fair Rents Act, 1936, by its own failure to obtain that consent.

ACTION for possession of a dwellinghouse which was acquired by the plaintiff Board in 1924 as a residence for the Board's resident engineer. The purchase was made under the authority of s. 15 of the Electric-power Boards Amendment Act, 1922, with the consent of the Minister. Defendant was the Board's resident engineer at the time of the purchase, and he had occupied the house ever since. He had paid rent at £1 8s. per week since 1929. His employment was terminated on October 15, 1945. For some months the Board continued to send monthly accounts for the rent, which was duly paid. On February 15, 1946, plaintiff gave defendant one month's written notice to quit, on the ground that the dwelling was required for the occupation of the new resident engineer. Defendant did not vacate the premises in compliance with the notice, and the Board now asked for possession.

Laurenson, for the plaintiff.

A. M. Ongley, for the defendant.

Cur. adv. vult.

MARSACK, S.M. Mr. *Laurenson* contends that the dwellinghouse is not within the provisions of the Fair Rents Act, and he relies on ss. 93 and 122 (3) of the Electric-power Boards Act, 1925. Section 122 (3) reads as follows:—

"In the event of any dwelling acquired or erected by the Board for the purposes of this section being no longer required for those purposes, the Board may sell, let, demise, exchange, or otherwise dispose of the same in such manner and on such terms as the Board, with the approval of the Minister, thinks fit."

Mr. *Laurenson's* submission is that the Board has no power to let the premises without the consent of the Minister; that a new tenancy was created on October 16, 1945, when defendant ceased to be an employee of the Board, and the consent of the Minister was not obtained to this new tenancy; that, accordingly, the letting was illegal and could not constitute a tenancy within the Fair Rents Act.

It is clear that the original letting to the Board's engineer complied in every way with the provisions of the Electric-power Boards Act. Section 3 of the Fair Rents Amendment Act, 1942, provides that the principal Act shall apply to every dwellinghouse that on the passing of the Amendment Act or at any time thereafter is let as a dwellinghouse. At that time defendant was the lawful tenant of the plaintiff Board, and the house was accordingly subject to the Act.

It is not contended that he occupied the premises otherwise than as a tenant. In any event there is nothing to show that he was com-

pelled to live in that particular house in order satisfactorily to perform his duties, and this would be necessary in order to prove that his occupation was that of a servant: *20 Halsbury's Laws of England*, 2nd Ed. 13, para. 8. At the termination of the defendant's employment, therefore, an order for possession could be made only in pursuance of s. 13 of the principal Act and s. 63 of the Finance Act, 1937. It would be necessary for the plaintiff Board to prove (a) that the premises were reasonably required for occupation by a person in the regular employment of the landlord; (b) either that suitable alternative accommodation was available for the tenant, or that the balance of hardship was in favour of the employee of the Board.

If proceedings for possession had been commenced immediately upon the termination of the defendant's employment, he would have been entitled to the protection of the Fair Rents Act. In my view, the Board cannot deprive the tenant of that protection by its own failure to fulfil its duty of obtaining the Minister's consent to the continuation of the tenancy. The property let remains a "dwellinghouse" within the definition given in s. 3 of the Fair Rents Amendment Act, 1942, and the plaintiff must establish the grounds set out above before becoming entitled to an order for possession. In this case it is admitted that no suitable alternative accommodation was made available to defendant, and there is no evidence as to hardship. Consequently an order for possession will be refused.

Order refused.

Solicitors for the plaintiff: *Innes and Oakley* (Palmerston North).
Solicitor for the defendant: *A. M. Ongley* (Palmerston North).

JUDD v. MANAWATU-OROUA RIVER BOARD AND ANOTHER.

1946. March 19, April 1, before Mr. C. C. MARSACK, S.M., at Palmerston North.

Wages Protection and Contractors' Liens—Contract by Company in Liquidation unfinished and Work Abandoned—No Part of Contract Price due and payable until Contract completed—Progress Payments by Employer of 75 per cent. of Value of Work done—Claim by Sub-contractor against Employer for Balance due to him and for Charge on Moneys in Employer's Hands—No "moneys payable to the contractor . . . by whom he is employed"—No liability on Employer to pay until Work completed—Wages Protection and Contractors' Liens Act, 1939, ss. 21, 32—Statutes Amendment Act, 1940, s. 59.

A charge to which a subcontractor is entitled under s. 21 of the Wages Protection and Contractors' Liens Act, 1939, attaches only to moneys "payable to the contractor by whom he is employed"; and, although s. 59 of the Statutes Amendment Act, 1940, extended the employer's obligation to retain one-fourth of the progress payments, it conferred on the subcontractor no rights beyond those given him by s. 32 of the principal Act.

Consequently, even when a contract provides for retention by the employer of one-fourth of the value of the work done, a subcontractor has no right of charge on the moneys so retained unless and until the contractor has actually completed the whole of the work; because, until then, the employer has in hand no moneys which the contractor has the right to demand, and payment of which he can enforce.

Taupo Totara Timber Co., Ltd. v. Smith and Egden ((1910) 30 N.Z.L.R. 77) applied.

ACTION claiming £120 against the company, and for a charge for that amount over moneys payable by the Board to the company. The company was now in liquidation, and Mr. *Ongley* admitted that he could not obtain judgment against the company; but he contended that he could still obtain a charge against funds in the hands of the Board.

A contract was entered into on March 6, 1944, between the Board and the company under which the company agreed to carry out certain works for the Board for the total sum of £3,413 6s. 8d. This was known as Section A. Subsequently the contract was extended to include Section B, which formed part of the same scheme of river-works. The price for this section was £1,237 10s., making a total for the whole contract of £4,560 16s. 8d. The company did not fulfil its obligations under the contract. The bulk of the work in Section A had been completed, but the greater part of Section B was unfinished. The company had abandoned the contract, and the Board would have to complete the work itself or by letting other contractors. The estimate of the Board's engineer was that the cost of finishing the work would be not less than £1,000, probably more.

Progress payments, to the amount of 75 per cent. of the value of the work done in each case, were made to the company, the first of these on June 14, 1944, and the last on March 14, 1945. These payments totalled £3,235, leaving a balance under the contract of £1,415 16s. 8d.

Plaintiff, a subcontractor of the company, took proceedings before the Supreme Court and obtained on February 8, 1946, a charge, by consent, against moneys in the hands of the Board to the extent of £397 18s. and an order (which was not by consent) for its payment forthwith. After payment of this sum and of the Board's legal costs of the action, there remained in the hands of the Board £1,001 10s., approximately the amount which in the opinion of the engineer would be required to finish the work.

On October 16, 1945, plaintiff gave a further notice of charge for the sum of £120 due to him by the company in respect of work done as a subcontractor from August 1 to 20, 1945, and on December 19, 1945, filed these present proceedings.

A. M. Ongley, for the plaintiff.
Oram, for the River Board.

Cur. adv. vult.

MARSACK, S.M. [After stating the facts, as above:] The right of charge is given by s. 21 of the Wages Protection and Contractors' Liens Act, 1939. This section provides that the charge attaches to "the

"moneys payable to the contractor by whom he is employed . . .
"under his contract." If there are no moneys payable by the employer to the contractor, there is nothing to which the charge can attach. "The Act does not enlarge the obligations of the employer; "it merely intercepts the money actually payable by him to his contractor": *Farmers' Union Trading Co. v. Bryant* ([1925] N.Z.L.R. 390, 393).

In order for plaintiff to succeed, he must therefore show that there are moneys payable to the contractor by the employer. Leaving out of consideration for the moment s. 59 of the Statutes Amendment Act, 1940, it seems to me clear that the Board holds no moneys payable or to become payable to the company. The agreement between the parties is definite on the point. Clause 17 (a) reads:

"No part of the contract price shall become due and payable
"until the contractor has received the certificate of the engineer
"that the works are completed but for the maintenance."

The position in this case is similar to that in *Taupo Totara Timber Co., Ltd. v. Smith and Egden* (1910) 30 N.Z.L.R. 77. There *Edwards, J.*, says: "A contract for the execution of a whole work for a lump sum
"is an entire contract, and the moneys payable under it cannot be
"recovered until the work is performed in its entirety" (*ibid.*, 81, 82).

The Board has accordingly no moneys which the company has a right to demand, or payment of which the company can enforce. That being so, there is no fund to which the charge can attach.

There remains for consideration the effect of s. 32 of the Wages Protection and Contractors' Liens Act, 1939, as amended by s. 59 of the Statutes Amendment Act, 1940. This reads:

"In addition to the amount (if any) that he is required by the
"last preceding section to retain, every employer or contractor,
"whether or not he has received any notice of lien or charge, shall
"retain in his hands one-fourth of so much of the contract price as
"has for the time being become immediately payable or would be
"so payable but for a provision inserted in the contract or sub-
"contract to secure its retention in conformity with this Act, until
"the expiration of thirty-one days after the completion of the work
"specified in the contract or subcontract."

Although cl. 17 (a) of the agreement of March 6, 1944, categorically states that no part of the contract price shall become payable until the works are completed, there is provision under cl. 17 (b) for progress payments:

"For the convenience of the contractor, the engineer shall at the
"end of each month during the progress of the work estimate the
"value of work or material actually done or used in the construction
"of the works during the month or since the last advance. If such
"value amounts in the opinion of the engineer to £500 he shall grant
"to the contractor a certificate declaring such value and the pro-
"prietor on presentation of such certificate to him shall advance to
"the contractor a sum equal to 75 per cent. of such value."

It will be noted that the word used is "advanced" and not "paid." At the same time the last paragraph in cl. 17 (b) gives the contractor a right, *inter alia*, to sue for payment of the "advance" so certified by the engineer. As the contractor has a right to enforce payment through the Courts; it seems clear that, notwithstanding the provisions of cl. 17 (a),

each of these progress payments represents a part of the contract price which has become immediately payable, within the meaning of s. 32.

It is not easy to interpret the meaning of the 1940 amendment with reference to the facts of the present case—that is to say, to determine whether the Board has complied with the section in paying only three-fourths of the value of the work done, or whether it was under a legal obligation to retain a further fourth of the actual “advance” made payable under the agreement. I think that the action of the Board in advancing only 75 per cent. of the value of the work done would be held to be a compliance with the statute. But from a practical point of view it seems immaterial in this case which interpretation be adopted. If the Board has fulfilled its obligations, then it holds in its hands moneys which were payable under the contract. If not, then the Board was obliged to retain one-fourth of the 75 per cent. which was so payable, and “by disregarding the provisions of the statute may lay itself open to loss and be compelled to pay twice over,” to adopt the words of *Alpers, J.*, in *Farmers' Union Trading Co. v. Bryant* ([1925] N.Z.L.R. 390, 393). In either case it follows that the Board has in hand moneys, sufficient to meet the claim, which were payable under the contract.

The only point now requiring determination is whether plaintiff is entitled to his charge, and, if so, to immediate payment from the Board. It is to be noted that the moneys retained under s. 32 are to be held “until the expiration of thirty-one days after the completion of the work specified in the contract.” It was not contended that at the time notice of charge was given the Board held moneys payable or to become payable under the contract beyond the sum required to be retained in hand under s. 32, so that no right could arise to an absolute charge under s. 31.

It was held by *Edwards, J.*, in his exhaustive judgment in the *Taupo Totara Timber Co.* case (1910) 30 N.Z.L.R. 77 that s. 59 of the 1908 Act creates a liability on the part of the employer only when the work is actually completed; if the work is never completed, in the words of the learned Judge, the provisions of the section can clearly have no application. Section 59 of the 1908 Act corresponds with s. 32 of the Act of 1939; and though the 1940 amendment increases the employer's obligation to the extent that he must retain one-fourth of progress payments, no further rights are given to the claimant than under s. 59. The judgment in the case quoted seems to me to determine the matter. It may be urged that the 1940 amendment was intended to give a subcontractor further protection than he had under the former section, and that this interpretation renders the amendment nugatory in cases such as the present one where the contract is abandoned. But if it was intended to give the subcontractor a right to payment against the employer the section does not say so. It merely provides that one-fourth of the progress payments is to be retained until thirty-one days after the completion of the work. The reasoning of the learned Judge in the *Taupo Totara Timber Co.* case, and particularly that set out on p. 81, in my view applies with little variation to this action; and the plaintiff's claim for a charge and for an order for payment must accordingly fail. I allow the Board three guineas costs against plaintiff.

Judgment for the defendant Board.

Solicitor for the plaintiff: *A. M. Ongley* (Palmerston North).

Solicitors for the defendant Board: *Oram and Yortt* (Palmerston North).

[IN THE COURT OF APPEAL.]

LOWER HUTT CITY CORPORATION v. HAIN.

COURT OF APPEAL. Wellington. 1946. June 11, 12; July 8. SIR MICHAEL MYERS, C.J.; BLAIR, J.; JOHNSTON, J.; FAIR, J.; CORNISH, J.

Rating—Systems of Rating—Annual Value—Change from Rating on Unimproved Value on September 8, 1945—Council's Resolution passed on October 8, 1945—that System of Rating on Annual Value should "in future be in force"—Whether System of Rating on Annual Value in force from April 1, 1946—Result of Poll signed by Substitute Returning Officer on behalf of Mayor—Validity—Whether s. 44 (2) of Rating Act, 1925, complied with—Rating Act, 1925, ss. 4, 7, 8, 44 (2).

Before the year 1921, the system of rating on the capital value was in force in the Lower Hutt Borough. In that year, the system was changed to rating on the unimproved value. Pursuant to a poll duly taken on September 8, 1945, the system of rating on the basis of the unimproved value was, on September 10, 1945, declared by the substitute returning officer to have been rescinded. The notice of the result of the poll published in the *New Zealand Gazette* as required by s. 44 (2) of the Rating Act, 1925, was signed by the substitute returning officer with the authority of the Mayor and on his behalf.

On October 6, 1945, the Council of the City of Lower Hutt, the borough, owing to the increase in population having become a city under the Municipal Corporations Act, preferring to act under the powers of s. 4 of the Rating Act, 1925, passed the following resolution:—

"That the Lower Hutt City Council, being a local authority of a district in which the system of rating on the unimproved value is not in force, by resolution determines that in future the system of rating applicable to the City of Lower Hutt shall be on the annual value."

Professing to act under the powers in s. 4 of the Rating Act, 1925, that the system of rating on the annual value should in future be in force in the said city, on November 16, the Council, pursuant to s. 8 of that statute, appointed a valuer, who duly prepared and signed a valuation list in the prescribed form and transmitted it to the Council before January 15, 1946. Thereafter all matters necessary to enable a rate to be made and levied on the annual valuation were done, and all necessary steps taken to comply with the provisions of the Act were taken. Subsequently thereto, a number of ratepayers, having questioned the validity of the proceedings taken to enable the rate to be made and levied on the system of rating on the annual value of the property in the city, the plaintiff Corporation issued an originating summons under the Declaratory Judgments Act, 1908, asking the Supreme Court to determine whether such power existed. That summons was removed into the Court of Appeal for argument.

In that originating summons the following questions were asked:—

1. Whether the Council of the plaintiff Corporation, a poll having been conducted pursuant to s. 44 of the Rating Act, 1925, rescinding the previous proposal adopting rating on the unimproved value, such poll being conducted and duly declared in the month of September, 1945, could by resolution of the said Council passed in the month of October, 1945, pursuant to s. 4 of the Rating Act, 1925, validly determine that the system of rating on the annual value shall be in force in the district as from April 1, 1946?
2. Whether in such circumstances a valuation roll prepared and transmitted to the said Council on or before January 15, 1946, in accordance with ss. 7 and 8 of the Rating Act, 1925, is validly available to the said plaintiff Council for the carrying into effect of the resolution referred to in question 1, above?
3. Whether the requirements of s. 44 (2) of the Rating Act, 1925, are satisfied if the Chairman of the said Council causes the result of the poll to be published by an officer of the Corporation, as in this case, or whether the said section requires a notice over the signature of the Chairman himself?

Held, per totam curiam, 1. That s. 44 (2) of the Rating Act, 1925, requiring that "the Chairman shall publish the result of the poll" had been complied with.

2. That the system of rating on unimproved value continued in force until and including March 31, 1946.

3. That, notwithstanding the words in s. 4 (1) of the Rating Act, 1925 ("other than a district wherein the system of rating on the unimproved value is "in force"), s. 4 should be interpreted so as to enable a local authority, once the system of rating on unimproved value has been validly rescinded, to determine by resolution whether the system of rating is to be on annual or the capital value as from April 1, immediately following the resolution, and to take forthwith the steps required by the section of the Rating Act, 1925, relating to rating on the annual value.

Accordingly, the answer to each of the said questions was "Yes."

Per *Myers*, C.J., *Johnston*, *Fair*, and *Cornish*, JJ., That the Council, by the use of the words "in future" in its resolution, determined in effect that the new system of rating on annual value should come into force as from April 1, 1946, and that the said resolution was valid.

Per *Blair*, J., dissenting, although agreeing that the answer to each of the three questions should be "Yes," That question 1, as framed, was based upon imaginary and not true facts, and the Council did not validly determine that rating on annual value should be in force as from April 1, 1946; because if that resolution had been passed on April 1, 1946, or, although passed on October 8, 1945, had been expressed to become operative only on and after April 1, 1946, it would have been a valid resolution; and that the said resolution was therefore nugatory; and the only way, short of statutory corrections and validation, to bring into force a rating on the annual value, would be to pass a new resolution to do so forthwith.

ORIGINATING SUMMONS under the Declaratory Judgments Act, 1908, to determine questions of law arising under the Rating Act, 1925, the determination of which was necessary for the guidance of the plaintiff Corporation in the performance of its statutory duties.

5 On or about August 13, 1945, a petition was delivered to the Mayor of Lower Hutt in pursuance of s. 40 of the Rating Act, 1925, signed by not less than 15 per cent. of the ratepayers on the roll and demanding that a proposal to rescind the system of rating on the basis of the unimproved value be submitted to the vote of the ratepayers. The Mayor, 10 in pursuance of s. 40 (2) of the Act, duly fixed September 8, 1945, as the day upon which the votes of the ratepayers should be taken upon the said proposal.

A poll was duly taken on September 8, 1945, and resulted as follows : For the proposal, 1,560 ; against the proposal, 284 ; informal, 26 : Total 15 votes recorded, 1,870.

Mr. T. G. Richardson was duly appointed as the substitute returning officer in substitution for the late Mr. B. S. Knox, who was the Town Clerk of the plaintiff Corporation, and the returning officer of the Corporation. Upon the instructions and by the direction of the Mayor, 20 Mr. Richardson caused to be inserted in the *New Zealand Gazette* and in a newspaper circulating in the district, on September 13, 1945, a notice of the result of the poll and a declaration that it had been carried. Such notice was in the following form :—

LOWER HUTT CITY COUNCIL.

RESULT OF POLL.

25 PURSUANT to the provisions of s. 42 of the Rating Act, 1925, I hereby give notice that a poll on the proposal that the adoption of the system of rating property on the basis of the unimproved value thereof be rescinded in the City of Lower Hutt, taken on the 8th day of September, 1945, the voting was as follows :—

For the proposal	..	..	..	1,560
Against the proposal	..	..	..	284
Informal	..	..	..	26

and, as there were 1,276 votes more in favour of the proposal than against same,
I hereby declare the above poll to have been carried.

Dated at Lower Hutt, this 10th day of September, 1945.

T. G. RICHARDSON,

Sub. Returning Officer.

On October 8, 1945, the Council of the plaintiff Corporation by resolution determined that pursuant to s. 4 of the Rating Act, 1925, the system of rating on the annual value should in future be in force in the said city and attached hereto. A copy of such resolution was as follows :—

It was resolved on the motion of His Worship the Mayor, seconded by Councillor Gregory,—

“That the Lower Hutt City Council, being a local authority of the district in which the system of rating on the unimproved value is not in force, by resolution determines that in future the system of rating applicable to the City of Lower Hutt shall be rating on the annual value.”

On November 16, 1945, the Council appointed a valuer pursuant to s. 8 of the Act; and on November 16, 1945, he duly made and subscribed the declaration required by the statute. He duly prepared and signed a valuation list in the form No. 2 in the Schedule to the Act and transmitted it to the Council before January 15, 1946.

Pursuant to s. 15 of the Rating Act, 1925, the Council duly caused the said valuation list to be deposited at a convenient place and public notification thereof to be given; and laid open for the inspection of all persons interested therein until February 15, 1946.

All matters necessary to enable a rate to be made and levied on the annual valuation had been attended to, and all the necessary steps taken.

In a circular prepared by the Lower Hutt City Council and distributed to the ratepayers before the said poll, an undertaking was given that, if the proposal were carried, the Council would pass a resolution adopting the system of rating on the annual valuation in future.

On April 5, 1946, the Town Clerk was informed that if the Council proceeded to rate on the annual value an objection would be raised to the validity of such proceedings and the Council's action would be tested by Court action. He was further informed that an objection would be raised as to the validity of the carrying of the said poll in that the notice published by the Chairman pursuant to s. 44 (2) of the Rating Act, 1925, did not contain the signature of the Chairman of the Council. The Council subsequently resolved to seek a declaratory judgment in order to ascertain whether the intention of the Council to strike a rate on the annual value, and the steps leading thereto, were valid.

The following were the questions for determination :—

1. Whether the Council of the plaintiff Corporation, a poll having been conducted pursuant to s. 44 of the Rating Act, 1925, rescinding the previous proposal adopting rating on the unimproved value such poll being conducted and duly declared in the month of September, 1945, could by resolution of the said Council passed in October, 1945, pursuant to s. 4 of the Rating Act, 1925, validly determine that the system of rating on the annual value shall be in force in the district as from April 1, 1946?

2. Whether in such circumstances a valuation roll prepared and transmitted by the said Council on or before January 15, 1946, in accord-

ance with ss. 7 and 8 of the Rating Act, 1925, is validly available to the said plaintiff Council for the carrying into effect of the resolution referred to in question 1, above?

3. Whether the requirements of s. 44 (2) of the Rating Act, 1925, are satisfied if the Chairman of the said Council causes the result of the poll to be published by an officer of the Corporation, as in this case, or whether the said section requires a notice over the signature of the Chairman himself?

By consent, the proceedings were ordered to be removed into the Court of Appeal for argument.

Sim, K.C., for the plaintiff Corporation. *As to question 1*: This question, in brief, asks whether the plaintiff Corporation has done everything effective to bring in rating on the annual value as from April 1, 1946. In 1921, there was a change from rating on the capital value to rating on the unimproved value. Section 45 of the Rating Act, 1925, authorizes the system of rating on the annual value. The words "in force," where used in the statute, have a dual meaning: either "in force for present rating purposes," or "in force for future rating purposes."

The words "in force" are used in the latter sense in s. 4 (1), and in the former sense in s. 4 (2). When a district has effectively carried a rescinding poll it has conformed to the requirements of s. 4 (2), and the qualification in parentheses is satisfied and has no further application: so that, on the day after the carrying of the rescinding poll, the plaintiff Corporation became a "district" (as defined in s. 2), within s. 4 (1) without any qualification, because the change from rating on the unimproved value to rating on the annual value had been carried out in accordance with the requirements of s. 4 (2). This left it free to pass immediately a resolution of the kind specified in s. 4 (1).

The true meaning of s. 4 (1) is gathered from a consideration of the sections which were amalgamated in 1908—namely, s. 4 of the Rating Act, 1894, and the provisions of the Rating on Unimproved Value Act, 1896. The words in parentheses in s. 4 (1) are introduced merely to preserve harmony with subs. 2 and could have been better expressed by words at the beginning of subs. 1—*viz.*, "Subject to the provisions of subsection two hereof." After the date of the poll the system of rating on the unimproved value had a residuary operation for rating purposes, but by reason of the additional resolution the annual-value-rating system became effective for future rating purposes in place of the capital value which had been displaced in 1921 by rating on the unimproved value. Nothing in s. 45 or any other part of the statute says implicitly what system is in force between the carrying of the poll and March 31 following it. The words "in force" are used in other parts of the Act as meaning coming into force in the future. In s. 7 the words "in force" must be given the meaning as required of "in force in the future," or "coming into force." As to the use of a word with different meanings in the same statute, see *Souter v. Mosgiel Borough*(1), *Maxwell on Interpretation of Statutes*, 8th Ed. 276, 277, 278, 31 *Halsbury's Laws of England*, 2nd Ed. 482, para. 599.

[FAIR, J., refers to *Watson v. Haggitt*(2).]

The words "in force" have always the same meaning, but they can be applied in the present or to the future. The application here is necessary to be to the future if s. 7, wherein a pending charge is in

(1) (1913) 32 N.Z.L.R. 1273.

(2) (1927) N.Z.P.C.C. 474, 476.

prospect, is to be given its full effect. Otherwise s. 45 would be inoperative for a year after the rescinding poll, when the rating on unimproved value had been preceded by rating on annual value. Section 45 refers back to s. 4 (1) and (2) with the construction contended for.

As to question 2: This is subsidiary, and, if the first question is answered in the affirmative, the answer to the second question follows. 5

As to question 3: The notice given on September 10, 1945, was a valid notice under s. 44 (2) of the Rating Act, 1925. The words "shall publish" mean "shall cause to be published": see s. 42, which is substantially incorporated in s. 44. In the notice itself of which the publication is not questioned, it is shown to be given pursuant to s. 42, which shows that it was published by direction of the Chairman, and see the Chairman's affidavit on the facts. As to the meaning of the word "caused," see *Stiles v. Galinski*(3). If the notice is in substance a declaration of material from which it is clear that a poll has been carried, that is sufficient. As to the sufficiency of the declaration of the poll generally, see *Leonard v. Salmon and Hauraki Plains County*(4) and *Pritchard v. Bangor Corporation*(5). 10 15

[CORNISH, J., refers to *Scott v. Watkins*(6)].

Ministerial acts may be delegated to one of the officers of a public body: *London County Council v. Hobbis*(7) and *Bowstead on Agency*, 10th Ed. 6. The declaration, having regard to what it is in substance, coupled with the word "cause," involved the Chairman in the performance of a merely ministerial act: see the reference to the declaration in subs. 2, which is a continuation of what the Chairman was bound by subs. 1 to "cause" to be done. 20 25

Gillespie, in support. The system of collecting rates at the commencing date of the rating year is indicated by inference in s. 51 (1) (a) of the Rating Act, 1925. The form of the rate-book is referred to in s. 52 (1), and see Form 7 in the First Schedule. Reference is made in s. 61 to Form 8, the form of demand for rates, the second column of which indicates the period for which the rate is payable. The usual period is from April 1 to the following March 31, but there is no statutory specification of that period: see the Municipal Corporations Act, 1933, ss. 71, 77, and the definition of "financial year" in s. 2 of the Acts Interpretation Act, 1924; and see also the Urban Farm Lands Rating Act, 1932, ss. 17, 18. There is nothing to make compulsory a valuation year commencing on April 1. 30 35

Cousins, for the defendant. *As to question 1:* The words in parentheses in s. 4 (1) of the Rating Act, 1925, taken alone, leaving aside everything else in the Act, their plain and natural meaning is "a district wherein the system of making and levying rates on the unimproved value is in force." That meaning is borne out by the words "in force" in other parts of the Act: see s. 4 (4), which is referable to a lesser local body within another district in which a system of rating is in force. If a rate were levied in the intervening period, it would have to comply with s. 51 (d), which lays down the condition that rating must be on the rateable value on the valuation roll when the rate is struck: and see the meaning of the term "rateable value" in s. 2. To give effect to the plaintiff's contention the words "in force" must be given 40 45 50

(3) [1904] 1 K.B. 615, 622.

(4) [1922] N.Z.L.R. 1068.

(5) (1888) 13 App. Cas. 241, 251, 262.

(6) [1928] N.Z.L.R. 628.

(7) (1896) 75 L.T. 687.

different meanings in the same statute, and this should be avoided in interpretation. It should not be assumed that the Legislature intended that a local body could be able to change directly from rating on the unimproved value to rating on the annual value; because the Court

5 must proceed on the basis that the Legislature has not made a mistake: *Special Income Tax Commissioners v. Pemsel*(8).

The words "in future" in s. 4 (1) are important: they imply that the local authority is able to make and levy rates immediately under the new system. If that be correct, the section cannot apply to the plaintiff
10 Corporation, as s. 45 prevents the plaintiff from giving effect to a resolution in respect of the new system as from April 1 of the next year. Section 45 requires the plaintiff to rate after March 31 on the annual value. Therefore the plaintiff cannot pass a resolution under s. 4 (2) until after March 31. The petitioners, by the date of presenting their
15 petition, not the local body, control the poll. The decision in *McLauchlan v. Marlborough County*(9) has no bearing on this case. At the present, case is not covered by the legislation—there is a *casus omisus*: 31 *Halsbury's Laws of England*, 2nd Ed. 497, 498, *Richards v. McBride*(10), and *Reg. v. Dyott*(11). As to the contention that a
20 district, having carried out a rescinding poll, has complied with the requirements of s. 4 (2) and that the qualification in parentheses has no further application, s. 45 makes it clear that the change is not to be operative until after March 31 following. Having regard to s. 3, it is impossible that more than one system of rating should be in force at one
25 and the same time.

As to question 2: However question 1 be answered, question 2 should be answered in the negative. In s. 8 (4) of the Rating Act, 1925, which provides for the making of the roll by the valuers, the term "rateable value," as defined by s. 2, applies to the system of rating in
30 force in the district. Section 24 provides for an Assessment Court, and s. 28 (1) that the Judge shall fix the place of sittings. The notice of valuation states where the Court is to sit: see Forms 3 and 4 in the First and Second Schedules. None of these sections apply unless a system of rating on the annual value is then in force.

As to question 3: To comply with the provisions of s. 44 (2) the notice must contain a declaration by the Chairman, who cannot delegate the actual declaration, which must appear over his name. Any acts or duties which, except for the purpose of exercising an authority or imposing a duty, which a person is required to do in his own proper
40 person may not be delegated: see ss. 40 (1) (2), 42. The duties of the Chairman and the returning officer, preliminary to the poll, are distinct. The returning officer is concerned only with the actual voting at the poll, and, when that is completed, he is *functus officio*; duties involving discretion are imposed on the Mayor, and on the Mayor alone: see
45 ss. 40, 42, and 45. The declarations of the poll are prescribed by ss. 32 and 57 of the Local Elections and Polls Act, 1925. Here, the returning officer has signed the declaration of the poll, without authority and under the Rating Act, 1925. There is nothing to show that it was the Mayor who made or authorized the declaration, or that he had any knowledge
50 of it. It purports to be made by the returning officer, and the use of the words "I declare" negative, by the use in s. 42 of the opening words, any introduction of the Mayor's authority. The word "publish," substituted for the word "gazette" in s. 44 (2) of the Rating Act, 1925, shows

(8) [1891] A.C. 531, 549.

(9) [1930] N.Z.L.R. 746.

(10) (1881) 8 Q.B.D. 119, 124.

(11) (1882) 9 Q.B.D. 47.

the importance attached to the notice. Section 44 takes away the delegation indicated in s. 42, and requires the Chairman himself to "publish" the result. *Leonard v. Salmon and Hauraki Plains County*(12) is distinguishable: it merely defines the duties of the returning officer, under s. 2 of the Local Elections and Polls Act, and he had quite properly made the declaration. 5

[MYERS, C.J., drew attention to the *dicta* in *Leonard v. Salmon and Hauraki Plains County*(13), distinguishing the meanings of the word "publish" and the phrase "cause to be published," and relating to the respective duties of the Chairman and the returning officer. In s. 44 (2) the use of the word "publish" indicates that the power of delegation is taken away. 10

The judgment in *Watson v. Haggitt*(14) in the Privy Council should be read in conjunction with the judgment of the Court of Appeal(15).

[To CORNISH, J.] Section 45 makes it clear that when a district has effectively carried a rescinding poll, and has complied with s. 4 (2), the change is not to be operative until March 31, following. If plaintiff's contention be correct, there must be two systems of rating in force at the same time; but, having regard to s. 3, only one system can be in force. 20

Sim, K.C., in reply. The *dicta* cited from *Leonard v. Salmon and Hauraki Plains County*(16) refer to s. 32 of the Local Elections and Polls Act, 1925, under which the Chairman had duties under ss. 10-13 of that Act and are different from the Chairman's duty under the Rating Act, 1925. 25

[MYERS, C.J. The words in s. 44 (2) of the Rating Act, 1925, are the same as s. 11 of the Local Elections and Polls Act, 1925.]

The words in s. 44 (2) incorporate the words "in like manner" and they, in turn, incorporate s. 42 under which the Chairman becomes involved in no duties requiring skill or the exercise of discretion; and the declaration accordingly becomes a routine matter. 30

After the rescinding proposal has been carried, s. 45 imposes a mandate for the following April 1, subject to the provisions of s. 4, which can be used on April 2, if required. The process of resolution may equally be used between the date of the poll and March 31, succeeding. The Court may interpolate words to make the section workable as from the date on which the poll was carried, and the Act is regarded as always speaking: Acts Interpretation Act, 1924, s. 5 (*d*). Here, there is no need for interpolation, as the matter is implicit in view of s. 4, which must normally be read with s. 45. 35

As to the introduction of words, if necessary, into s. 45, see *31 Halsbury's Laws of England*, 2nd Ed. 497, para. 635. Those words should be "subject to the provisions of s. 4": thus is brought about the intention of the Act that there should be free passage from one system of rating to another. This construction harmonizes ss. 4, 7, and 45, and, in addition, secures a reasonable result. 40

Cur. adv. vult.

MYERS, C.J. The validity or otherwise of what the local authority has done depends upon some three or four sections of the Rating Act, 1925. By s. 4 (1) of that Act it is enacted that— 50

(12) [1922] N.Z.L.R. 1068.

(13) *Ibid.*, 1070.

(14) (1927) N.Z.P.C.C. 474, 476.

(15) [1927] N.Z.L.R. 209, 224, 225.

(16) [1922] N.Z.L.R. 1068, 1070.

The local authority of any district (other than a district wherein the system of rating on the unimproved value is in force) may at any time by resolution determine whether the system of rating on the annual value or the capital value shall in future be in force in the district, and any such resolution may from time to time be rescinded and a new resolution passed.

On April 1, 1945, the commencement of the 1945-46 rating year, the City of Lower Hutt, being a district in which the system of rating on the unimproved value was in force, was *prima facie* excluded from the operation of that provision.

The provision that did apply to the case is subs. 2 of s. 4, which enacts that—

For the purpose of adopting in a district the system of rating on the unimproved value, or of discontinuing that system in a district where for the time being it is in force, the provisions of sections thirty-nine to forty-seven hereof shall apply.

In accordance with the provisions of those sections the requisite proportion of the ratepayers demanded that a proposal to rescind the system of rating on the basis of the unimproved value be submitted to the vote of the ratepayers. This was done, with the result that there were 1,560 votes cast for the proposal, 284 against the proposal, and there were also 26 informal votes. Section 44 (2) requires that the Chairman—that is to say, the Mayor of the city—shall publish the result of the poll within the time and in the manner prescribed in the case of an adopting proposal, such prescription being contained in s. 42. The question whether or not the notice which was published is a valid notice is one of the questions that the Court is asked to answer. I shall consider it later.

Section 45 of the Act enacts that—

If such rescinding proposal is carried in any district, then, from and after the thirty-first day of March succeeding the date of the gazetting of the Chairman's notice of the result of the poll, rates shall cease to be made and levied on the unimproved value, and shall be made and levied in the manner in which they were made and levied before the adopting proposal was carried.

(Prior to the adoption in Lower Hutt, before the district became a city, of the system of rating on the unimproved value, the system in force was that of rating on the capital value.)

After the gazetting of what the local authority relies upon as the notice publishing the result of the poll for discontinuing the system, the local authority proceeded to pass a resolution in purported pursuance of s. 4 (1) determining that in future the system of rating applicable to the city should be rating on the annual value. The question is whether that resolution is valid, and whether the system of rating in the Lower Hutt City is accordingly rating on annual value as from April 1, 1946. At first sight it would appear that, by virtue of s. 45, upon rates ceasing to be made and levied on the unimproved value after March 31, 1946, they were to be made and levied on the capital-value-rating system, that being the system which was in force before the adoption of the system of rating on the unimproved value. I have no doubt that that would be the position if nothing more were done, but I think that as soon as the system of rating on the unimproved value is validly rescinded, s. 4 (1) may be read as if the words in parentheses, "other than a district wherein the system of rating on the unimproved value is in force," are omitted, so that the subsection then reads, "The local authority of any district may at any time by resolution determine whether the system of rating on the annual value or the capital value shall in future be in force in the district." The resolution may be made "at any time," and, of course, is to operate

in futuro. I assume that, speaking generally, a resolution under s. 4 (1) would be passed to take effect at the following first day of April—that is to say, as from the commencement of the ensuing rating year. But that is not necessarily so: I assume that a resolution could be passed early in a rating year before the rates for that year were struck, and the rates for that year would then be made and levied in accordance with the resolution. But that cannot be done in a district where rating on the unimproved value is in force: in such a district, even though a rescinding proposal might be adopted early in the rating year before the rates were struck, the statute requires that for that year the rates must still be made and levied on the unimproved value. When a rescinding proposal has been carried—or rather when the requisite notice to that effect has been given—the force of the system of rating on the unimproved value is for all practical purposes spent, though it is true that no rates may be made and levied under any other system until after the expiration of the then current rating year—*viz.*, March 31. The effect is, of course, that no resolution by the local authority adopting either the capital-value or the annual-value system can become operative before April 1. I think that the expression “is in force” in the words in parentheses in s. 4 (1) means until the discontinuance of the rating on the unimproved value has been validly carried and notice thereof published as the statute requires. I think, therefore, that the words in s. 45, “shall be made and levied in the manner in which they were made and levied before the adopting proposal was carried,” must be read subject to the power of the local authority under s. 4 (1), with the words in parentheses omitted, to determine by resolution whether the system of rating is in future—that is to say, in the circumstances of this case as from the beginning of the next rating year—to be on the annual value or the capital value. On that view it follows that the resolution of the local authority now in question is authorized by law, provided that the previous proposal for the adoption of rating on the unimproved-value system was validly rescinded.

The ballot-paper did not strictly comply with the statute. The proposal was described in the ballot-paper as a “Proposal that the adoption of the system of rating property on the basis of the unimproved value thereof be rescinded in the City of Lower Hutt.” That is what was contemplated by the provisions of s. 44 of the Rating Act, but that section is affected by s. 72 of the Statutes Amendment Act, 1941, by subs. 3 of which the proposal should have been described as “A proposal to abandon the system of rating on the unimproved value.” However, I think that the description in the ballot-paper complied substantially though not strictly with the statutory provision and that the divergence cannot be regarded as material. The real point on this branch of the case is whether s. 44 (2) of the Act was complied with. That is the provision which requires that the Chairman shall publish the result of the ballot within the time and in the manner prescribed in the case of an adopting proposal. If that provision was not complied with, it would appear that, notwithstanding the result of the poll, the making and levying of rates on the unimproved value would have to continue because, under s. 45, rating on that system ceases from and after the thirty-first day of March succeeding the date of the gazetting of the Chairman’s notice of the result of the poll. Consequently rating on the unimproved value would not cease if the provision of s. 44 (2) were not complied with, but the system would continue until validly determined. In point of fact, nothing was published under the hand

of the Mayor. What was published was a notice signed by Mr. T. G. Richardson, the substitute returning officer. Whatever may be said of this notice, it certainly was not strictly in order. It commences "Pursuant to the provisions of s. 42 of the Rating Act, 1925." It
5 should have been expressed as given pursuant to s. 44 (2), not 42, though s. 44 (2), it is true, incorporates by reference s. 42. Then the notice says "I hereby declare the above poll to have been carried." The declaration should have been made by the "Chairman" for the purposes of s. 44 (2). But, as I have said, s. 44 (2) incorporates by reference
10 the provisions of s. 42 which deals with the publication of the result of a ballot for the adoption of the system of rating on the unimproved value, and it says—

Within twenty-one days after the result of the poll has been ascertained the Chairman of the local authority shall cause a notice of the number of votes recorded
15 for and against the proposal, as hereinbefore provided, to be published in the *Gazette*, and also in one or more newspapers circulating in the district; and in such notice he shall declare the proposal to be carried or rejected, as the case may be.

It is curious that s. 42 should use the words "the Chairman of the local
"authority shall cause . . . to be published" while s. 44 uses the
20 words "The Chairman shall publish," but it is difficult to see why in the one case a notice should be published by the Chairman himself, while in the other it is sufficient if a notice is given by some one else by the Chairman's direction. In the present case the substitute returning officer deposes that he published the notice by the direction of the
25 Chairman, though why the notice should not have said so, or why for that matter it should not have been under the hand of the Chairman himself, it is difficult to understand. But it must be said that s. 44 does not seem necessarily to require that the notice shall be signed by the Chairman. It does require, by reference to s. 42, publication (a) of
30 the result of the poll—that is to say, the number of votes recorded for and against; (b) within twenty-one days; and (c) in the *Gazette* and in one or more newspapers circulating in the district. That is what is meant I think by the words "within the time and in the manner, &c.," in s. 44 (2). Those requisites were complied with. Every blunder
35 has been made by the local authority and its officers that could be made, but, reading ss. 42 and 44 (2) together, and seeing that the notice is shown to have been published by direction of the Chairman and that it contains the information which the statute requires to be given, I think, though not without some hesitation, that there has been substantial
40 compliance with the statutory requirements and that the blunders are therefore not fatal.

If the resolution determining that the system of rating on the annual value shall be in force in the district as from April 1, 1946, is valid, as I
45 have said I consider it is, it follows I think that s. 7 of the Act must be read so as to be consistent with that result, and that accordingly the valuation list prepared and transmitted to the City Council on or before January 15, 1946, in accordance with ss. 7 and 8 is validly available for the carrying into effect of the resolution.

I think that each of the three questions asked by the originating
50 summons should be answered in the affirmative.

It was necessary for the plaintiff Corporation in its own interests to take these proceedings, and it must pay the defendant's costs.

BLAIR, J. [After setting out the questions for determination:] It was stated during the argument that it was desired that question 3 be answered to whatever extent the Court considered proper.

In and prior to the year 1921 the Hutt City Corporation, which was then a borough under the Municipal Corporations Act, made and levied its rates under the capital-value system, but in that year it took all necessary steps to alter its rating system to that of the unimproved value. Owing to increase in population, the borough subsequently became a City under the Municipal Corporations Act, but this change has no effect whatsoever upon the questions to be decided in this originating summons.

On or about August 13, 1945, a petition was delivered to the Mayor of Lower Hutt City in pursuance of s. 40 of the Rating Act, 1925, signed by not less than 15 per cent. of the ratepayers on the roll, demanding that a proposal to rescind the system of rating on the basis of unimproved value be submitted to the vote of ratepayers. In pursuance of s. 40 (2) of that Act, the Mayor fixed September 8, 1945, as the date upon which a poll of the ratepayers should be taken upon the said proposal. The form of voting-paper setting out the proposal to be voted upon was—

Proposal that the adoption of the system of rating property on the basis of the unimproved value thereof be rescinded in the City of Lower Hutt.

Incidentally, it may be mentioned that during the argument some reference was made as to whether "rescinded" or "discontinued" was the correct word that should have been used, but admittedly nothing turns upon that in this case.

The poll was duly taken on September 8, 1945, and resulted as follows : For the proposal, 1,560 ; against the proposal, 284 ; informal, 26 : Total votes recorded, 1,870.

The returning officer and Town Clerk of the Hutt City was one Bertram Sinclair Knox, but owing to the indisposition of Mr. Knox, one Thomas Guy Richardson became the substitute returning officer of the plaintiff Corporation in respect of this poll. In an affidavit made by him he says :

upon the instructions and by the direction of the Mayor I caused to be inserted in the *New Zealand Gazette* and in a newspaper circulating in the district on the 13th day of September 1945 a notice of the result of the poll and a declaration that it had been carried . . .

It is suggested for the defendant that that notice and declaration was not validly made. It reads as follows :—

LOWER HUTT CITY COUNCIL.

RESULT OF POLL.

PURSUANT to the provisions of section 42 of the Rating Act, 1925, I hereby give notice that a poll on the proposal that the adoption of the system of rating property on the basis of the unimproved value thereof be rescinded in the City of Lower Hutt, taken on the 8th day of September, 1945, the voting was as follows :—

For the proposal	.. .. .	1,560	45
Against the proposal	.. .. .	284	
Informal	.. .. .	26	

and, as there were 1,276 votes more in favour of the proposal than against same, I hereby declare the above poll to have been carried.

Dated at Lower Hutt, this 10th day of September, 1945.

T. G. RICHARDSON,

Sub. Returning Officer.

It is claimed on behalf of the defendant that the poll is invalid because the result was not published in the manner prescribed by s. 42 of the Rating Act, and that the time within which that result could validly be published has expired. Section 42 reads :

Within twenty-one days after the result of the poll has been ascertained the Chairman of the local authority shall cause a notice of the number of votes recorded for and against the proposal, as hereinbefore provided, to be published in the *Gazette*, and also in one or more newspapers circulating in the district; and in such notice he shall declare the proposal to be carried or rejected, as the case may be.

It is objected that the notice and declaration purporting to have been given was not signed by the Chairman of the local authority, but was signed by Mr. Richardson, the substitute returning officer of the plaintiff Corporation. It is submitted that the Chairman has no power of delegation, and that even if he had the power, the notice is not framed in such a way as to indicate that it was published under delegated authority from the Chairman. Although there was irregularity, in my view such is not fatal.

By s. 2 of the Rating Act the word "Chairman" means, *inter alia*, the Mayor of a borough, and he it was who should have complied with the requisites set out in s. 42. The affidavit made by Mr. Richardson, already quoted, states that the publication of the result was "upon the instructions and by direction of the Mayor," but the difficulty in the case is that nowhere in Mr. Richardson's notice is that fact in anywise stated. It is further submitted that as Mr. Richardson's notice commences by stating that he is acting "pursuant to the provisions of 'section 42,'" such is a sufficient indication to any one that the notice has been "caused to be inserted" by the Mayor. Even if it be permissible for the Mayor to direct the Town Clerk or the substitute returning officer to supervise the publishing of the notice, the declaration of the result of the poll must be made by the Mayor himself. In Mr. Richardson's notice he takes it upon himself to declare the poll to have been carried. Various important results take place in consequence of the Mayor's declaration.

In *Leonard v. Salmon and Hauraki Plains County*(1), the question arose as to whether the result of a poll authorizing the raising of a special loan under the Local Bodies' Loans Act, 1913, had been properly published, and a petition for an inquiry into the taking of the poll was filed. The point in that case was as to whether a petition against the poll had been filed within the prescribed time, which time was calculated from the declaration of the result of the poll, and it was held that time ran from the public notification by the returning officer of the number of votes given for and against the proposal. By s. 12 of the Local Bodies' Loans Act, 1913, it was provided that the Chairman shall send to the Minister a notice of the number of votes recorded for and against a proposal, and in such notice shall declare the proposal to be carried or rejected. That notice was given by the Chairman by giving the respective numbers of the votes for and against the proposal, but he did not formally declare that the proposal had been carried. *Stringer, J.*, held that the giving of the respective figures for the votes for and against the proposal was a sufficient declaration that the proposal had been carried by the requisite majority. That case was one relating to a poll for a loan, and the declaration by the Chairman did not declare the poll was carried, but he did declare the number of votes for and against the proposal. Under that statute there was a duty cast upon the Chairman to send to the Minister a notice of the number of votes recorded for and against the proposal, and to declare the proposal to be carried or rejected as the case may be. The learned Judge, *Stringer, J.*, considered under those circumstances that a declaration

(1) [1922] N.Z.L.R. 1068.

of the votes for and against the proposal constituted a sufficient declaration of the result of the poll. That case was cited as one indicating that want of strict compliance with the precise terms of the statute was not fatal.

Although not free from doubt, I think that the declaration in this present case was not invalidly made. The consequences might be serious if the ratepayers were delayed in the making of a change in the rating system due to a mere blunder in the form of compliance with certain formalities. Although my view is that the declaration of the result of the poll is valid, still, I consider that *ex abundanti cautela* the irregularities should be cured under s. 99 of the Rating Act if possible. It was stated at the Bar that a promise has been given that if this poll is found to be irregular, such irregularities will be waived under that section. That answers the third question in the originating summons. I answer that question first because it should have been the first submitted.

The next question in the order for answering is question 1. On October 8, 1945, the Council of the plaintiff Corporation by a resolution determined that pursuant to s. 4 of the said Act the system of rating on the annual value should in future be in force in the said city, and a copy of that resolution is as follows:—

It was resolved on the motion of His Worship the Mayor, seconded by Councillor Gregory,—

“That the Lower Hutt City Council, being a local authority of a district in which the system of rating on the unimproved value is not in force, by resolution determines that in future the system of rating applicable to the City of Lower Hutt shall be on the annual value.”

The form of this resolution is misstated in question 1 of the originating summons. It is there stated that the resolution determined that the system of rating on the annual value “shall be in force in the district as from the first day of April, 1946.” If the resolution had been in that form, the City’s position in respect of that resolution would have been, I think, immune from attack. I consider that the resolution as actually passed is a nullity. Had it been in the form as misstated in the first question in the case, then, in my view, it would have been unquestionably valid. I shall amplify that point later on.

On November 16, 1945, the Council, pursuant to s. 8 of that Act, appointed a valuer, and on the same day he duly made and subscribed the declaration required by the said Act. The valuer duly prepared and signed a valuation list in Form 2 in the Schedule of the said Act, and transmitted it to the Council before January 15, 1946, and that list lay open for inspection until February 15, 1946. Those formalities were all fulfilled in purported pursuance of ss. 8 and 15 of the Rating Act. I see no reason why these matters preliminary to bringing into operation annual-value rating should not be done in anticipation once the necessary poll has been obtained.

One of the facts stated in the case is that the Council, in the circular which was sent to ratepayers prior to the poll, gave an undertaking that if the said proposal was carried it would pass a resolution adopting the system of rating on the annual value. It does not seem to me that this circular is either material or relevant to the questions submitted in the case, except in so far as it indicates that it had determined prior to the poll that if the poll was successful it would adopt a third system of rating, which is neither rating on unimproved value nor rating on capital value, and that is what it purported to do by the resolution of October 8, 1945, before mentioned.

In s. 4 of the Rating Act, 1925, three systems of rating are referred to, these being rating on (a) annual value, (b) capital value, and (c) unimproved value.

As before indicated, the Lower Hutt City originally used the system of rating on the capital value, and it continued using that system till it, pursuant to a vote of ratepayers, changed to the unimproved-value system in the year 1921. Thereafter it used the unimproved-value system until it proceeded last year to change it for the third method of rating known as the annual-value system. The first question asked in this summons involves an examination of the steps taken by the Hutt City Corporation to change from the unimproved-value system to the annual-value system. Although it is possible for a direct change to take place from the capital-value system to the unimproved-value system or *vice versa*, it is not possible to accomplish a change from the unimproved-value system to the annual-value system without at least a nominal reversion, say for a day, to the capital-value system. Section 4 of the Rating Act, in effect, prevents a direct change from unimproved to annual value, because it forbids a local body in whose district the unimproved-value system is in force from passing a resolution to effect a direct change. A change to the unimproved-value system of rating requires the approval of a poll of ratepayers, and having once adopted that system a change back to rating on capital value also requires the sanction of a poll of ratepayers.

The first thing such a local body must do is to obtain a poll of ratepayers by the necessary majority of votes to authorize the discontinuance of the unimproved-value-rating system. And the effect of the due carrying of a poll authorizing such a discontinuance is clearly set out in s. 45 of the Rating Act. It reads as follows:—

If such rescinding proposal is carried in any district, then, from and after the thirty-first day of March succeeding the date of the gazetting of the Chairman's notice of the result of the poll, rates shall cease to be made and levied on the unimproved value, and shall be made and levied in the manner in which they were made and levied before the adopting proposal was carried.

Assuming the poll to be validly made, or (if invalid) assuming that invalidity to have been cured, there is a dispute between the parties as to the effect of the resolution of October 8, 1945. The dispute is as to the moment of time from which the resolution became operative. For the defendant it is claimed that such a resolution could not become operative or of any legal effect until April 1, 1946. The City Council disputes that view, and claims that there is a certain operative effect, the details of which I shall endeavour to explain. To resolve this dispute involves, first, an examination of the relevant provisions in the Rating Act, 1925, the first of which are ss. 3 and 4 of that Act.

Section 3 refers to three systems of rating, as already detailed. At the time of the taking of the poll already mentioned, the system in operation at the Hutt City was rating on unimproved value. Having got a poll discontinuing rating on unimproved value it was desired to take the necessary steps to adopt rating upon the annual value. As already indicated a change of the method of rating from unimproved value to capital value, or *vice versa*, can be comparatively easily done, provided the necessary poll of the ratepayers authorizes a change, and the scheme of the Act is that if it is desired to change from the unimproved-value system to the annual-value system, then that change can only be accomplished in the case of a local body which has adopted the system of rating on unimproved value (as was the position here) by first obtaining authority from the ratepayers to discontinue the unimproved-value

system. Assuming for the purpose the validity of the poll, then the Hutt City Corporation has so far progressed upon its journey to annual value by having obtained the consent of its ratepayers to discontinue its present system.

Next we turn to s. 45 (already quoted), as to the effect of a rescinding proposal having been carried as is the position here. The system of rating originally followed in the Hutt City was rating on capital value, but as already stated the City, when it was a borough, changed in the year 1921 to the unimproved-value system. Consequently, therefore, s. 45 requires that from and after the gazettement of the result of the poll the borough must continue rating upon the basis of unimproved value until March 31, 1946. Thereafter, pursuant to s. 45, as from April 1, 1946, the city reverts to the capital-value system.

As already indicated, the ratepayers of Lower Hutt had been promised that the basis of rating to be substituted for the unimproved-value basis was to be rating upon the annual value. I repeat that all that it can accomplish by a valid resolution passed on October 8, 1945, would be one making rating upon annual value operative only as from April 1, 1946. If, therefore, the question were asked (as it is asked in this appeal), what was the system in operation between the date of the poll and the thirty-first day of March, 1946, unquestionably the answer would be that it was rating on the unimproved-value system, because it is abundantly plain from s. 45 that the poll discontinuing that system is effective only from and after March 31, 1946. Section 45 makes it plain that once the discontinuing poll is carried, then as from April 1, succeeding that poll, the capital-value system automatically comes into being, because the capital-value system was the system in operation in the year 1921 immediately before it changed to the unimproved-value system.

Considerable argument was submitted to us, aimed at putting a gloss upon s. 45, by somehow bringing in by means of the resolution of October 8, 1945, an implication in favour of the existence of rating on annual value to a limited degree; but, in my view, the meaning of s. 45 is plain, and there is not the slightest doubt that until March 31, 1946, the Hutt City was "a district wherein the system of rating upon the unimproved value" was in force. Those words are taken from s. 4 (1) of the Rating Act, and in relation to this matter that section is of great importance. It reads:

The local authority of any district (other than a district wherein the system of rating on the unimproved value is in force) may at any time by resolution determine whether the system of rating on the annual value or the capital value shall in future be in force in the district, and any such resolution may from time to time be rescinded and a new resolution passed.

Section 4 is the section which authorizes and provides the method of, *inter alia*, discontinuing or adopting the system of rating on unimproved value. Had it not been for the exception embodied in s. 4 (1) above quoted, then it would have been possible to make a direct change from annual value to capital value, or *vice versa*, and one reason why that special exception was inserted in that subsection is that, as will be seen by reference to s. 8, the valuation roll which is used for rating by local bodies rating on the capital value or unimproved value is a roll supplied by the Valuer-General under the Valuation of Land Act, 1925, but when we look at s. 7, it will be seen that where the system of rating on the annual value is in force, a valuation is to be made as later provided in the Rating Act. The machinery for making the roll to be used where annual value is in vogue is set out in ss. 8 to 37 of that Act.

Those sections contain a complete code for the making of a valuation list by a valuer or valuers appointed by the local body, and provide also for the ultimate moulding of that valuation list into a valuation roll after a specially constituted Assessment Court has dealt with all
5 objections thereto.

In the case of municipalities using the unimproved-value or capital-value system, they obtain their valuation roll ready-made from the Government Valuation Department.

For the purposes of this judgment, importance attaches to the fact
10 that the valuation roll which is used for rating on the annual value is brought into being by the local body itself, and all disputes as to values are settled by a Court, the Judge of which is a Magistrate exercising jurisdiction within the district, and of the two assessors constituting the remaining members of that Valuation Court, one of them is to be
15 appointed on the recommendation of the local authority.

Mr. *Sim* submitted to the Court at some length an argument that the words "is in force" in s. 4 had a dual meaning—namely, "in force" for present rating purposes, or "in force" only for future rating purposes—and he claimed that those words in s. 4 (1), which subsection I
20 have quoted in full, are used in the second sense, and he endeavoured to persuade the Court that if that meaning was adopted, as he claimed it must be, then the bracketed exception in s. 4 (1) would become inapplicable to the Hutt City, and the effect of that would be to get rid of the exception in s. 4 (1), and thus permit the Hutt City to pass the resolution
25 contemplated by s. 4 (1), notwithstanding that the City would, until March 31, still be rating on unimproved value. A resolution to that effect was purported to have been passed by the Council of the Hutt City on October 8, 1945(2). I entertain no doubt that s. 4 (1) means and was intended to mean that any local body using the unimproved-
30 value system of rating cannot, while that system is in force, validly alter its system to the annual-value or the capital-value system without the *imprimatur* of another poll of ratepayers, and the words "in force" mean the period up to which it is entitled to and bound to use the unimproved-value system of rating.

Turning to s. 45 again, that section means no more and no less than
35 that if a rescinding proposal is carried that rescinding proposal becomes operative only to change the system of rating as from March 31 next succeeding the declaration of the result of the poll. It is to be observed that any borough desirous of making the change necessary to bring in
40 rating on the unimproved-value basis would have to comply with all the procedure provided by ss. 39 to 47, and by s. 43 the same result as *mutatis mutandis* is provided in s. 45 is attained. That means that notwithstanding a successful poll to adopt unimproved value, it is not
45 until after the thirty-first day of March succeeding the gazetting of the result of such a poll that rates must be made and levied on the unimproved value. Thus it is that s. 43 and s. 45 is each the complement of the other.

I am clearly of opinion that although the resolution purporting to adopt annual value was passed on October 8, 1945, the system of rating
50 on unimproved value must remain in force and operative as contemplated by the exception in s. 4 (1), and accordingly, therefore, that system remains operative and thus "in force" up to and including March 31, 1946. Actually that resolution in effect recites that the unimproved-value system was not, on October 8, 1945, in force in the Hutt City.
55 The recital that unimproved value was then not in force is inaccurate,

(2) *Ante*, p. 62, l. 22.

and the fact that they so recite cannot give them jurisdiction to pass by means of a resolution to change to annual value, the passing of which is forbidden in effect to all boroughs using the unimproved-value system.

Although the resolution of October 8, 1945, is, in my view, nugatory as already explained, nevertheless immediately rating on capital value has become in force and operating in the city by reason of the carrying of a poll to discontinue the unimproved-value system, then under s. 45 the exception already referred to under s. 4 (1) of the Rating Act is no longer a bar to the city passing a resolution determining that the system of rating on the annual value shall be in force in the district. In other words, the resolution of October 8, 1945, if it had been passed on April 1, 1946, or although passed on October 8, 1945, had been expressed to become operative only on and after that date, would have been a valid resolution. True, s. 7 of the Act requires that a valuation roll shall be made. But that is a job that takes time—it may take some months, and a good deal of preparation—and I can see nothing in the Act to forbid the Council getting ready for the change to annual value at the earliest moment it is legally possible for it to make such a change. Indeed s. 4 (1) of the Act contemplates that the resolution to change to annual value will be operative *in futuro* because it uses the words “shall in future be in force in the district.” Valuation rolls may be made either annually or triennially, the latter of which looks somewhat to the future. There is a difference between a valuation list and a valuation roll. The former is what the valuer prepares, and he may be working on it for months getting ready for the time—January 15—when he has to produce it. The valuation roll, upon the other hand, is what is produced by the Assessment Court after it has sat and heard and determined all objections: see s. 33. If the valuation list is not duly produced by the valuer, then s. 31 empowers the Assessment Court to appoint valuers and prescribes the formalities there required. This indicates that a valuation list may be produced later than the statutory date. Thus it is plain that the non-production of a valuation list on due date is not fatal and it is clearly curable.

The matter of making rates is also a lengthy business, and full of formalities running well into any rating year before the rate can be demanded.

I have already referred to the machinery provided for the appointment of valuers and so on, and we learn from the case that a valuer was, pursuant to s. 8, purported to have been appointed on November 16, 1945. I can see no legal objection to such an appointment being made in advance and the work being done by him. I do not overlook the fact that the resolution of October 8, 1945, is, in my view, nugatory, but the whole of the ratepayers of the Hutt knew that the poll—whether legally declared or not—had expressed the voice of the requisite majority of the ratepayers of the city.

It is regrettable that the formalities called for by the statute have not been observed in respect of the resolution to bring in annual value, but there is much to be said for putting the blame on the statute or statutes.

The initial errors into which, in my view, the advisers of the Council fell were, first, the form of the declaration of the poll; and, secondly, the failure to make the resolution of October 8, 1945, operative only as from April 1, 1946. As earlier indicated, my view is that the irregularities regarding the declaration of the result of the poll can be

overlooked, but for abundance of caution should be validated. But as to the resolution of October 8, 1945, there is no means short of statutory validations whereby the borough can set back the clock so as to make its nugatory resolution effective to have operation in respect of a time which is now some two and a half months past. That can only be done by statute.

We must commence from this point that there can be no doubt that the ratepayers have validly expressed their will, and that expression must, if possible, be given effect to. It would be a grave injustice to the great majority of the Hutt ratepayers if their expressed determination, as indicated by their votes validly cast, is to be set at nought owing to legal difficulties in a statute, or rather more than one statute, which are by no means easy to understand, and there are also pitfalls which can easily be stepped into.

What is to be done, and what can be done? The technical mistakes relating to the formalities of the declaration of the result of the poll because being innocuous will need no special repair except possibly for abundance of caution. The next error is that of purporting to make the change immediately to annual value by the resolution of October 8, 1945, and the putting in of an incorrect recital. That motion purports to have only future operative effect, and if it had been expressed to have made that future effect not to begin till April 1, 1946, the resolution might have had a chance of survival, notwithstanding its incorrect recital. But those two blots were, I think, fatal to that resolution, and the only way, short of statutory corrections and validation, would be to start afresh with a new resolution to bring in annual-value rating forthwith.

If the Council had been advised to act with abundance of caution, it could have waited until April 1, 1946, to change from capital value to annual value, and in the meantime gone ahead with its preparations for the providing of the necessary valuation roll. The statute (s. 8 (4)) requires a valuation list to be made before January 15, and s. 15 requires that list to be open for inspection till February 15, with public notice thereof once a week. The right of inspection is given to all ratepayers. In order to be in time to fulfil those requirements, it had to commence on its valuation duties and its deposit of the valuation list long before April 1, which was the date when the changed system to capital value became operative. The earliest date that it could change the capital-value system to annual value was April 1, 1946. All those matters presented legal difficulties, and, looking back, I consider that the least risky course would have been to have passed the resolution to change from capital-value to annual-value rating on October 8 last, but making it plain that such resolution was not to be operative until April 1, 1946. They could at once have proceeded (as apparently they did) with the fulfilment of the various statutory requirements as to the making of a valuation roll in anticipation of the coming into force on April 1 of the capital-value system as provided by s. 45. It was the hurdle provided by the fixed dates already indicated that made the Council take precipitate action. Section 31 makes plain that that delay is curable if it is desired to pass a fresh resolution now. The preparation of validating legislation will require great care and expert advice, and possibly consultation with the Law Drafting officers.

I suggest the following answers to the questions propounded:—

Question 1: The answer to this question is "Yes"; but I must add that the question as framed is based upon imaginary facts. The

statement is not correct that the Council validly determined that annual-value rating should be in force "as from the first day of April, 1946." Moreover it erroneously recited that the unimproved-value system was "in force" in the Hutt City at the date of the passing of the resolution of October 8.

Question 2: My answer to that question is that if the poll had been validly declared, as I think it was, and if the resolution of October 8, 1945, had been framed to be operative only from and after April 1, 1946, then the steps taken to prepare a valuation list and the depositing of the same would, in my view, have been valid. The facts in relation to the lengths to which the Council went in relation to completing the valuation list and the valuation roll are not stated. I repeat that, in my view, the Council could have validly completed several steps towards bringing in annual-value rating as from April 1. I have already explained the difference between a valuation list (s. 8 (4)) and a valuation roll (s. 33). This question speaks of a valuation "roll" when obviously it is a valuation list that is referred to.

Question 3: My answer to this is "Yes."

JOHNSTON, J. I have had an opportunity of reading the judgment of *Cornish*, J.(1), and for the reasons given by him I think each question raised should be answered in the affirmative.

FAIR, J. Before the year 1921 the system of rating in force in the Lower Hutt Borough was rating on the capital value. In that year, the system was duly changed to rating on the unimproved value. Pursuant to a poll duly taken on September 8, 1945, the system of rating on the basis of the unimproved value was, on September 10, 1945, declared by the substitute returning officer to have been rescinded. On October 8, 1945, the Council of the Lower Hutt City by resolution determined, professing to act under the powers in s. 4 of the Rating Act, 1925, that the system of rating on the annual value should in future be in force in the said city. On November 16 it appointed a valuer pursuant to s. 8 of that Act, who duly prepared and signed a valuation list in the prescribed form and transmitted it to the Council before January 15, 1946. Thereafter all matters necessary to enable a rate to be made and levied on the annual valuation were done and all necessary steps taken to comply with the provisions of the Act were taken.

Subsequent thereto, the Town Clerk was informed that a number of ratepayers questioned the validity of the proceedings taken to enable the rate to be made and levied on the system of rating on the annual value of the property in the city, and stated that power to do so would be challenged in the Court. The City Council, therefore, issued an originating summons under the Declaratory Judgments Act, asking the Supreme Court to determine whether such power existed. That summons was removed into this Court.

The first question asked in it involves a determination as to the meaning of the words "other than a district wherein the system of rating on the unimproved value is in force" in s. 4 (1) of the Act. That subsection reads as follows:—

4. (1) The local authority of any district (other than a district wherein the system of rating on the unimproved value is in force) may at any time by resolution determine whether the system of rating on the annual value or the capital value shall in future be in force in the district, and any such resolution may from time to time be rescinded and a new resolution passed.

This question requires to be determined on the assumption that the poll was duly taken and the steps required by the Act to be taken in respect of it were effective to satisfy the requirements of the Act. Upon that assumption s. 45 comes into operation. That section provides as follows:—

45. If such rescinding proposal is carried in any district, then, from and after the thirty-first day of March succeeding the date of the gazetting of the Chairman's notice of the result of the poll, rates shall cease to be made and levied on the unimproved value, and shall be made and levied in the manner in which they were made and levied before the adopting proposal was carried.

Plainly this section continues the operation of the system of rating in force at the time the proposal for rescission was being considered until March 31 next succeeding the gazetting of the notice. Therefore, that system remains "in force" until that date. It is equally clear that from that date onwards the city would be required to revert to rating on the capital value until that was changed either to rating on the annual value or the unimproved value. A change to the capital value involves no special measures on the part of the local body concerned for, by s. 6, the valuation roll supplied by the Valuer-General under the Valuation of Land Act, 1925, is the valuation roll for rating on the capital value. A change to rating on annual value, however, requires a special valuation of such annual values to be made, and s. 8 and ss. 15 to 34 make elaborate provisions with reference to it, to some of which I shall refer specifically later. The whole purpose of them, however, is to enable a local body and any persons aggrieved and rate-payers to be informed on, and thereafter, if they so desire, to challenge the correctness of such valuations. The provisions are based on the assumption that the valuations are to be used in respect of rating for a rating year commencing about the first of April. This is shown by the fact that every objection is required to be delivered at the place of sitting of the Assessment Court set up in the Act on or before February 15. It would appear that unless the valuation list is prepared before January 15 (s. 8 (4)), and deposited at some convenient place to be publicly notified by the beginning of February (s. 15) in a year when valuation is required to be made, the valuation roll may not be lawfully used by the local body as the basis of its valuation for that year. These matters are adverted to to show the necessity for taking steps well before March 31, where it is necessary to prepare valuation lists in a district where there is in existence no valuation roll that can be used, as in the present case.

The objection raised to the Council's resolution to adopt the system of rating on the annual value is that it is debarred from doing that by the words I have quoted from s. 4, which excludes that power in the case of a district "where the system of rating on the unimproved value is in force." It is clear that, by virtue of the provisions of s. 45, rating on unimproved value was "in force" in the Lower Hutt City until March 31, 1946, and so was in force when the resolution was passed. The words under consideration, if read without a consideration of the machinery of the Act and their purpose, would appear, *prima facie*, not to authorize the passing of the resolution prior to March 31, 1946. The result of this construction would be that the resolution could not be passed until after that date, and owing to the provisions regarding the preparation of the valuation roll to which I have referred, and the dates fixed for the steps with regard to it, rating on annual value might not be able to be validly brought into force until the year commencing April 1, 1947.

This would mean a hiatus of a year before the Council could exercise the powers given it after the poll, by s. 4 (1). It would also necessitate the city being obliged to strike a levy of one year's rates on the basis of the capital value before commencing its rating on the annual value. These seem such arbitrary and anomalous results as to make it unlikely that the *prima facie* meaning of the words of the subsection, when read alone, is the proper meaning to be given to them. There is no reason to be found in the statute, or elsewhere, for considering that the Legislature intended to impose any such delay or condition before immediate effect could be given to the ratepayers' wishes. On the contrary, s. 4 (1) expressly and clearly intends to sanction the change from the system of rating on the capital values to the system of rating on annual values or *vice versa* upon the decision of the governing body of the district involved, and that without any poll or any special formalities other than those involved in the preparation of a special roll for rating on annual values. For a change to or from unimproved value to a different system of rating, a poll and much more elaborate steps are required. As rating on unimproved value was introduced only in 1896, it may well be that the introduction or abandonment of what was then a new and novel system was intended to be protected against hasty and short-term decisions by a snap or bare majority vote of the Council of a district, and that it was only to be introduced or abandoned after an opportunity for careful consideration by, and a determination at a poll by, the whole body of ratepayers affected.

There are no such safeguards imposed on a change from the annual to the capital system or *vice versa*. There is no indication that one rather than the other of these two systems was considered the more desirable: nor is there any indication that any checks or safeguards as to a decision by the Council were required. It seems, therefore, that if it was intended that there should be a delay of a year before a city or borough whose system of rating was originally on capital values could be changed to rating on annual values, it was not expressed in any explicit, or indeed, in any implied terms by the Legislature. If that situation does exist, it must be owing to the fact that these few words in parentheses in s. 4 (1) cause that result.

That it was probably unintended seems to be shown by the fact that there is no such delay or obstacle in changing directly from unimproved to capital value, for no special valuation roll has to be prepared in that case, and the resolution may be passed and become effective after April 1 in the rating year in and in respect of which the rates have to be levied. It is confirmed, too, by the fact that the change could probably have been made after the second of April if the valuation roll prepared for the first year's levy on that system can be prepared and used before the resolution of the Council as to the system of rating is made. That no safeguards were considered necessary in respect of the adoption of rating on annual values or a reversion to it, and that a necessary delay for a year would be anomalous, seems shown by the fact that there is no such delay where the system in force in the district before that upon unimproved values was adopted was rating on annual values, for there is an immediate reversion to it.

In such a case such reversion seems to imply that valuation rolls should be prepared prior to April 1 and that they are effective and valid. That, I think, shows beyond doubt that s. 7 of the Act and the succeeding sections authorize the preparation of such a roll prior to the rating year in which it is to be used. It would be unreasonable if,

though such preliminary steps in such a case are valid, the resolution passed in September to take effect after April 1 was not also valid.

The words in question are quite capable of bearing the meaning "in force at the time the resolution becomes operative," and, I think, the foregoing consideration of the scope and purview of the statute shows that to be the meaning that must be given. Mr. Cousins's argument involved that the words in s. 4 may mean "in force at the time the resolution is passed." As I have said, that would be a possible meaning and, indeed, perhaps the *prima facie* meaning, if the section were read apart from its context and the scheme and purpose of the Act. But in my view, for the reasons I have stated, that is not the meaning which it was intended to bear. To accept the primary meaning would be to adopt a superficial interpretation, adopting a construction amounting to grammatical literalism and ignoring the real purpose, meaning, and true intent of the provisions; and would, I think, be justly open to the reproach expressed in the maxim *Qui haeret in litera haeret in cortice*.

This may, perhaps, be best illustrated by pointing to the fact that the words "in force" must apply to some period of time. The provisions of the Act, and particularly s. 4 (2) and ss. 39 to 47, referred to in it show that the words in parentheses in s. 4 (1) apply to a case where a poll for a change in system has not been taken. Subsections 1 and 2 of s. 4 are complementary sections. They are intended to cover all three systems of rating and provide machinery for changing it. The purpose of the words in parentheses in subs. 1 is merely to exempt from the powers conferred by that subsection the adoption or discontinuance of the system of rating on the unimproved value, and the words must be read in the light of that purpose. If they are extended to delay a change from the capital to the annual value system, then it would be extending them beyond their purpose. Such a construction is not to be adopted unless the words are not fairly capable of an alternative construction in harmony with the scheme of the Act for enabling rating authorities to change the system. But they are fairly and reasonably susceptible of an alternative meaning. Indeed, it appears to me, that the only reasonable meaning is to take them as applying to the case of where a system of rating on unimproved values is "in force" at the time the proposed change is to be given effect to—that is, in force over a period for which the rates on the new system are proposed to be levied. In this case that period would be from April 1, 1946, to March 31, 1947. For that period, unless the terms of the Act were not complied with in relation to the change, rating on unimproved value will not be in force.

This construction is strengthened by the use of the words "in future" in s. 4 (1).

I think, therefore, the answer to the first question should be "Yes."

It follows, too, that the answer to the second question should also be "Yes."

The question as to the effect of the notice of the result of the poll not complying with all the requirements of s. 42 depends upon a consideration of ss. 44 and 42; and the principles determining what are the consequences of such non-compliance with this kind of provision. Section 44, as amended in 1941, provides:

44. (1) The adopting proposal may be rescinded in the manner and subject to the conditions, with the necessary modifications, prescribed by this Act for the carrying thereof.

(2) The Chairman shall publish the result of the poll within the time and in the manner hereinbefore prescribed in the case of an adopting proposal.

The time and manner for the publication of the result of an adopting proposal is prescribed in s. 42, which reads :

42. Within twenty-one days after the result of the poll has been ascertained the Chairman of the local authority shall cause a notice of the number of votes recorded for and against the proposal, as hereinbefore provided, to be published in the *Gazette*, and also in one or more newspapers circulating in the district ; and in such notice he shall declare the proposal to be carried or rejected, as the case may be.

It is first to be noted that the word "publish" in s. 44 (1) would mean, if it stood alone, "cause to be published"; and this meaning is confirmed by the express provision in s. 42. The facts in evidence before the Court show that the Mayor complied literally with every requirement in s. 42, except that he did not declare that, as a result of the voting, the poll had been carried. The substitute returning officer under his directions and upon his instructions did this.

The question then resolves itself into whether this omission renders the notice wholly ineffectual to bring into operation the provisions of s. 45.

Some indication as to the relative importance to be attached to the notice, as contrasted with the declaration that the proposal is carried, may be gathered from the fact that s. 45 refers to "the gazetting of the "Chairman's notice of the result of the poll"; although I do not overlook the fact that s. 42, read literally, directs that the notice is to contain a declaration by the Mayor that the poll is carried.

Such a declaration seems really only intended to add an appropriate conclusion and formal authorization to a notice that has already effected every substantial purpose for which publication is required. For, if the Mayor causes the number of votes to be published in the *Gazette* and another newspaper, that must necessarily imply that he considers the poll to have been regular and in accordance with law. Section 45 refers to the *result* of the poll being ascertained and s. 42 to it being *carried*. The publication of the result having been done with his authority, and apart from his declaration in the manner prescribed, the case falls, I think, within the principle of the decision in *Leonard v. Salmon and Hauraki Plains County*(1). True, there the returning officer had his name published with the notice, but in this case the signature by the substitute returning officer was a clear indication of official authentication—not required by the section—of the voting: and having regard to the voting, 1,560 for the proposal and 284 against, it is inconceivable that any ratepayer could have had any doubt that it was carried. That would be true in practically every poll on such an issue which, as every one knows, is generally a matter of discussion and personal interest by those voting. Moreover, the word "declare" may mean in this context "cause to be declared." These considerations show, in my opinion, that so far as this requirement in the form of the notice is concerned the section is directory. To hold otherwise in this, and other cases, would prevent the ratepayers' decision being given effect to owing to failure to comply with a requirement intended to add formality to a notice already clear, adequate, and issued by authority.

This construction seems confirmed, too, by the general principle of interpretation applicable to such provisions. That is set out in *Maxwell on the Interpretation of Statutes*, 7th Ed. 321, 323-24. It is said in *31 Halsbury's Laws of England*, 2nd Ed., 530, 531, para. 692 :

(1) [1922] N.Z.L.R. 1068.

Where the provisions of a statute relate to the performance of a public duty, and the case is such that to hold null and void acts done in neglect of that duty would work serious inconvenience or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, such provisions should be construed as being directory only and not imperative.

This passage is taken verbatim from the judgment of the Privy Council in *Montreal Street Railway Co. v. Normandin*(2). It seems to apply with full force to the result of a poll which is declared by the returning officer, and as to which all the ratepayers, being the persons concerned, have the right to vote, and must have had full information and an adequate knowledge as to the results of it being carried.

I think, therefore, that the notice was a sufficient compliance with s. 44 (2) and the notice was effective for all purposes.

15 CORNISH, J. Section 3 of the Rating Act, 1925, is as follows :—

The system of rating (whether on the annual, the capital, or the unimproved value) which is in force in each district on the coming into operation of this Act shall continue until altered under the provisions of this Act.

Section 4 (1) of the Act provides that—

20 The local authority of any district (other than a district wherein the system of rating on the unimproved value is in force) may at any time by resolution determine whether the system of rating on the annual value or the capital value shall in future be in force in the district . . .

Section 4 (2) enacts that—

25 For the purpose of adopting in a district the system of rating on the unimproved value, or of discontinuing that system in a district where for the time being it is in force, the provisions of ss. 39 to 47 hereof shall apply.

(These last-named sections require a poll of ratepayers for the purposes mentioned in the subsection.)

30 These provisions of the Rating Act are machinery created by the Legislature for the purpose of facilitating local taxation. Their purpose is to enable owners or occupiers of real property in the various districts of New Zealand to choose the system on which domestic taxes shall be levied, and to change that system when they wish to do so.

35 The Legislature is indifferent as to which system of rating any district chooses to adopt. Its only concern is to provide machinery by means of which the will of the ratepayers (or their representatives, the local authority) may be expressed and made effective.

40 Examination of the sections quoted above shows that any "determination" of a local authority is directed to the future, and the future only. It is not intended to become operative at the moment when it is made. The system of rating that is in force at the time of the determination must run its course. Only when the current rating period has expired will the determination become effective. The future, 45 not the present, is under the control of the local authority. But this control is not unlimited. If there be a question whether the system of rating on the unimproved value is to be in force in future, only the ratepayers' decision can settle that. And that system *will* be in force in future if the ratepayers decide (a) that it shall be adopted in place of 50 rating on the annual or the capital value, or (b) that, having been previously adopted, and being now in force, it shall continue to be in force. The second case will occur when a proposal to discontinue the system has been defeated at a poll.

In a district in which rating is, for the time being, on the unimproved 55 value, these alternatives in respect of the future exist: (a) The system *will* be in force "in future"—i.e., after the current rating period has ended. This is because it has either not been challenged, or has survived

(2) [1917] A.C. 170, 175.

a challenge. (b) The system will *not* be in force "in future" because the ratepayers have so decided. A challenge has succeeded. In such a case, the only future possibilities are rating on the annual value and rating on the capital value. Between these, the local authority is competent to decide. In my opinion, the words in parentheses in s. 4 (1), "other than a district wherein the system of rating on the unimproved value is in force," are not intended to withhold from the local authority power to make such a decision. All that they mean is that the local authority may not make a determination in the first of the alternatives I have mentioned above. A local authority may legislate for the future rating of a district, provided it does not purport to adopt or to abandon that system. Only the body of ratepayers may decide to do either of these. But, if the future is unencumbered by the system of rating on the unimproved value—if this system has been eliminated from the list of future possibilities so that the field of choice is narrowed to rating on the annual value and rating on the capital value—then, in such a case, there is nothing to prevent the local authority from determining by resolution which of these two systems of rating shall prevail.

In my opinion, the words in parentheses in s. 4 (1) should be read thus: "other than a district wherein the system of rating on the unimproved value is *to be* in force" (in future). I think that such a reading is necessary if effect is to be given to the purpose of the sections that I have quoted. To read them literally in the present tense would be to inflict on a local authority a purposeless disablement.

When, therefore, the City Council of Lower Hutt determined by resolution that the system of rating on the annual value should come into force "in future," it made provision for a future that was clear of rating on the unimproved value. The clearing had been done by vote of the ratepayers. The Council did not tamper or interfere with the system of rating on the unimproved value either in the present or for the future. Its resolution was directed to a period of time when, as the result of the poll already held, rating on the unimproved value should have spent its force in the district. That period began on April 1, 1946. When, therefore, the Council determined that the new system of its choice should come into force "in future," it determined, in effect, that it should do so as from April 1, 1946.

In my opinion, the Council disregarded no limitation imposed upon it by s. 4 (1) of the Rating Act, 1925. That which it was impliedly forbidden to do—*viz.*, to adopt or to abandon the system of rating on the unimproved value—it neither did nor attempted to do. All that it did was to make provision for the situation that would arise hereafter on the passing of the system which the ratepayers had rejected.

It is contended, however, that s. 45 of the Rating Act, 1925, shows that no such provision was necessary or, indeed, possible. This section provides that from and after a certain date, when the system of rating on the unimproved value shall have ceased to be in force in a district, "rates shall be made and levied *in the manner in which they were made and levied*" before the system of rating on the unimproved value was adopted. It is argued that "the manner" in which rates were formerly made and levied in the district was on the capital value; and that the district was, therefore, compulsorily remitted to that system as soon as the system that had been rejected at the poll had ceased to be effective.

To the question, "*In what manner* were rates made and levied in the Lower Hutt district before rating on unimproved value came into

“force?” any answer given must—if it is to be complete—state that these were made and levied according to the system determined upon from time to time by resolution of the Council. No adequate description of “the manner” in which they were made and levied could omit
5 reference to the means by which either of the two possible systems was brought into operation.

When, therefore, rates ceased to be made and levied on the basis of the unimproved value, and when, immediately thereafter, they came to be made and levied *just as they used to be made and levied* before
10 rating on unimproved value was adopted, it follows that they then fell to be made and levied pursuant to resolution of the Council. If, when the moment of change-over arrived, there was in existence a resolution of the Council covering the needs of the new situation, so much the better: the rates would then be made and levied in accordance with the
15 system adopted and approved by that resolution. In my opinion, therefore, the resolution of the City Council of Lower Hutt, passed in anticipation of its becoming operative as soon as resolution by the local authority should become the determinant of rating, was within the power of the Council; and was effectual to establish annual value as
20 the basis of rating from the moment that the rejected system expired.

I have so far assumed that the result of the rescinding poll was published in accordance with the requirements of the statute. If not, it may be that the system of rating on the unimproved value was not effectually terminated. In reference to a rescinding poll, s. 44 (2)
25 of the Rating Act, 1925, states that—

The Chairman *shall publish* the result of the poll within the time and in the manner hereinbefore prescribed in the case of an adopting proposal.

And s. 45 provides that if a rescinding poll is carried in any district,

then from and after the thirty-first day of March succeeding the date of the
30 gazetting of the *Chairman's notice* of the result of the poll, rates shall cease to be made and levied on the unimproved value, . . .

In the present case, the official who actually signed the gazetted notice was not the Chairman or Mayor, but a gentleman described as the “substitute returning officer.” For that reason, it is contended that the
35 notice was not a “Chairman's notice,” and that the condition of the termination of rating on the unimproved value was never fulfilled. In my opinion, this contention is not well founded.

The duty cast upon the Chairman in the case of a rescinding poll is substantially the same as in the case of an adopting poll. In the latter
40 case, s. 42 requires that the Chairman “*shall cause to be published*” in the *Gazette* a notice of the number of votes recorded for or against the proposal, and the fact that the proposal has been carried or rejected. Such an announcement is a “Chairman's notice” (s. 43) and, from and after March 31 succeeding its gazetting, rates shall be made and levied
45 on the unimproved value.

In my opinion, there is no difference of substance between a notice that has been personally signed by the Chairman and one that has been signed (as was the notice in this case) with his authority and on his behalf. Each is a “Chairman's notice.” The notice under consideration
50 made express reference to s. 43 (2) of the Act, thereby purporting to be made under that section, and showing that the act of publishing the result was the act of the Chairman. It is true that in the case of a rescinding poll the statute provides that the Chairman “*shall publish*” the result: and, that in the case of an adopting poll, that he shall
55 “*cause the result to be published.*” In my opinion, the expressions are

convertible. There is no reason to think that the Legislature regarded the announcing of the result of a rescinding poll as requiring precautions deemed unnecessary in the case of an adopting poll. In my opinion, the notice signed by the returning officer was a notice "published" by the Chairman by his authorized agent and was a valid Chairman's notice. 5

For the foregoing reasons, I consider that each of the questions raised by the originating summons should be answered "Yes."

Questions answered accordingly.

Solicitors for the plaintiff: *Bunny and Gillespie* (Wellington).

Solicitors for the defendant: *Findlay, Hoggard, Cousins, and Wright* (Wellington).

[IN THE MAGISTRATE'S COURT.]

WELLINGTON CITY CORPORATION *v.*
GIANOUTSOS.

1946. June 13, 20, before Mr. A. M. GOULDING, S.M., at Wellington.

Rates and Rating—Penalty upon Late Payment—Practice to accept Rates without Penalty if Posted on Latest Specified Day—Agency of Post Office—Company Ratepayer—Whether within Penalty Exemptions—Rating Act, 1925, s. 76—Statutes Amendment Act, 1938, s. 54 (3).

The Council of a municipal Corporation fixed March 5, 1946, as the last day for payment of rates. An advertisement published by it set out that resolution; and a note below it was to the effect that, to avoid the imposition of the penalty, payments of rates should be made on or before Monday, March 4, 1946. It was an established practice of the Corporation to accept rates posted on the specified day, though received after that date. A letter enclosing the amount of rates was posted on March 4.

In an action for recovery of the penalty for late payment of such rates,

Held, That, in fact and law, the payment of rates by letter posted on March 4 was in time to avoid the penalty, as the Corporation had treated the Post Office as its agent for receiving letters containing rates posted on the date in question.

Norman v. Ricketts (1886) 3 T.L.R. 182 followed.

Joyson's Executors v. Liverpool Corporation ([1938] 4 All E.R. 183) distinguished.

Semble. Where a limited company is the ratepayer the local body has no power under s. 54 (3) of the Statutes Amendment Act, 1938, to remit the penalty for late payment of rates.

ACTION by the Corporation for recovery of penalty upon rates owing by the defendant. The rates were duly levied in accordance with the Rating Act, 1925; and on August 14, 1945, demand was sent according to law. In due course the Council resolved, in November, 1945, to the effect that the additional charge of 10 per cent. on unpaid rates should become payable in accordance with s. 76 of the Rating Act, and fixed

Tuesday, March 5, 1946, as the last day for payment of rates. The Council published an advertisement setting out its resolution, and below the resolution a note intimating that the penalty would accrue if rates were not paid on March 5. The note added the following words: "To avoid the imposition of the penalty payment should be made on or before Monday, March 4, 1946."

The rating officer called for the plaintiff agreed that it had been the practice of the Council to accept the rates without penalty when the ratepayer posted a letter on the specified last day for payment of the rates, even though the actual payment was not received in course of post for one, two, or even three days after that date. He agreed that if a ratepayer in Invercargill were to post a letter on March 4, which did not arrive in Wellington for several days after that, the rate would be accepted without penalty.

In this particular case, however, the City Council received an envelope on March 8, containing a cheque for this ratepayer's rates, £90, and also a cheque for £11 15s. for the rates of another ratepayer. These cheques were enclosed with a letter from Messrs. O'Donnell, Cresswell, and Cudby, solicitors, dated March 4. The post-mark upon the envelope was indecipherable. Mr. King of the Rating Department telephoned Mr. Cresswell, who said that the letter was written on March 4 and though he did not post it he had given it to a member of the staff to post. Mr. Cresswell, who gave evidence, satisfied the learned Magistrate by his evidence, supported by that of his clerk, that that letter was posted at the G.P.O. at Wellington on March 4. The envelope was submitted to the Post Office for X-ray examination, but the Post Office could not decipher the post-mark. All they could say was that a loop appearing on the stamp suggests that the post-mark may be either the 3rd, the 5th, or the 6th March. In these circumstances the Council, after correspondence, decided it must proceed for recovery of the penalty.

S. H. Jones, for the Council.

R. L. A. Cresswell, for the defendant.

Cur. adv. vult.

GOULDING, S.M. [After stating the facts, as above:] Counsel for the plaintiff relies upon the case of *Joynson's Executors v. Liverpool Corporation* ([1938] 4 All E.R. 183). I think that case is distinguishable from the present. There the Corporation under a Local Act had power to demand payment of rates "on or before the expiration" of specified dates. It demanded payment of a rate that fell due on Sunday, November 7, on the next day the eighth. The ratepayer posted a cheque on Sunday, the seventh, but it was not received until after the eighth. The Court held that the Post Office was not the agent for the Corporation and, since the rate had not been received on or before the expiration of the specified date, the penalty was recoverable.

In this case, however, the note in the advertisement published by the Council to the effect that payments should be made on or before Monday, March 4, plus the practice of the Council of accepting rates posted on the fourth though received after that date, satisfies me that in fact and in law payment of the rates by this defendant was made on March 4. In other words, the City Council does treat the Post Office as its agent for receiving letters containing rates posted on the date in question—namely, March 4. If the Council wishes to adopt a different

practice, it should not lead ratepayers to believe that if they post their rates on the fourth they will be accepted.

In a case of *Norman v. Ricketts* ((1886) 3 T.L.R. 182), a creditor in London had written to her debtor asking that the latter should post her a cheque within a week. The debtor lived 150 miles from London. The debtor did post a cheque within a day or two of the receipt of the letter. It was stolen in the post, and, being an open cheque, the cheque was negotiated and presumably the thief got the money. The Court held in that case that the sending by post of the cheque was payment by the debtor following as it did an invitation to send a cheque.

I think similar reasoning can be applied with regard to payment of these rates. Once I am satisfied, as I am, that Mr. Cresswell's letter enclosing the cheque for rates was posted on March 4, then I think payment of the rates was made and the penalty is not recoverable.

I may add that presumably the decision of the Council to take action for the penalty is founded upon the provisions of s. 54 of the Statutes Amendment Act, 1938. That section empowers a local body to remit the additional charge of 10 per cent., but by subs. (3) expressly provides that it shall not exercise that power unless it is satisfied that undue hardship would otherwise be caused to the ratepayer. As the real ratepayer in this case was a limited company no doubt the Council felt that it did not come within the above provisions.

Judgment is therefore for the defendant but, in the circumstances, without costs.

Judgment for the defendant.

Solicitor for the plaintiff: *City Solicitor* (Wellington).

Solicitors for the defendant: *O'Donnell, Cresswell, and Oudby* (Wellington).

[IN THE SUPREME COURT AND IN THE COURT OF APPEAL.]

TOLLAN *v.* WELLINGTON HARBOUR BOARD AND
PORT LINE, LIMITED.

WELLINGTON HARBOUR BOARD *v.* TOLLAN AND
PORT LINE, LIMITED.

SUPREME COURT. Wellington. 1946. February 7, 8, 11, 18. JOHNSTON, J.

COURT OF APPEAL. Wellington. 1946. June 20, 21, 24, 25 ; September 27. BLAIR, J. ; FAIR, J. ; CORNISH, J.

Master and Servant—Negligence—Transference of Employment—Crane-driver—Hiring of Crane and Driver—Negligence of Driver—Injury thereby caused to Third Person—Whether Regular Employer or Hirer liable—Test applicable—Respondeat superior.

In applying the doctrine of *respondeat superior* where a vehicle or other instrument is let out on hire with the service of its driver or operator and an accident occurs through the negligent act of the driver or operator causing personal injury to a third person, *prima facie* the responsibility for such negligence is on the general and permanent employer, who engages and pays the driver or operator. The burden of proving that the responsibility had shifted to the hirer rests on such general employer ; and it can be discharged only by positive proof of the assumption of such responsibility by the hirer.

One test in considering who is the *superior* of the negligent workman for the purpose of the application of the doctrine of *respondeat superior* is the answer to the question whether, in the doing of the negligent act, the workman was exercising the discretion given to him by his regular or general employer or whether he was obeying or discharging a specific direction of the hirer for whom, upon his employer's direction, he was using the vehicle or other instrument. The power of control of the new *superior* must be present in connection with the doing of the particular act which proves to be tortious, and so gives the injured party a right of action. No other control is relevant.

The application of the doctrine of *respondeat superior* to each particular case depends upon facts, and is a question of fact, and the facts of one case are useful only so far as a similarity of facts is a help or guide to a decision.

So held by the Court of Appeal (*Blair and Cornish, JJ., Fair, J., dissenting*), in determining that, on the facts of this case, the control had not shifted to the hirer, thus dismissing an appeal from the judgment of *Johnston, J., post*, p. 80.

Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board(1), *Dowd v. W. H. Boase and Co., Ltd.*(2), *Nicholas v. F. J. Sparkes and Son*(3), *Cairns v. Clyde Navigation Trustees*(4), and *M'Cartan v. Belfast Harbour Commissioners*(5) applied.

Donovan v. Laing, Wharton, and Down Construction Syndicate, Ltd.(6), *Bain v. Central Vermont Railway Co.*(7), *A. H. Bull and Co. v. West African Shipping Agency and Lighterage Co.*(8), and *Hunia v. Winstone Ltd.*(9) distinguished.

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| (1) [1942] A.C. 509 ; [1942] 1 All E.R. 491. | (6) [1893] 1 Q.B. 629. |
| (2) [1945] K.B. 301 ; [1945] 1 All E.R. 605. | (7) [1921] 2 A.C. 412. |
| (3) [1945] K.B. 309n. | (8) [1927] A.C. 686. |
| (4) (1898) 25 R. (Ct. of Sess.) 1021. | (9) [1946] N.Z.L.R. 817n. |
| (5) [1911] 2 I.R. 143. | |

MOTIONS FOR JUDGMENT by each of the parties to this action on the findings of the jury.

The plaintiff, a tally clerk, claimed damages for injuries received during the loading of cases of butter from a Wellington Harbour Board

wharf into the the ship *Port Melbourne* of which the second-named defendant, the Port Line, Ltd., was the owner.

At the conclusion of the taking of evidence counsel saw the learned trial Judge in Chambers and it was agreed that issues should be put to the jury. The issues agreed upon and the answers of the jury thereto were as follows :— 5

1. Was it negligent to place the truck in the position it was? *Answer* : Yes. If so, was such negligence a substantial cause of the accident? *Answer* : No.

2. Was there negligence in the operation of the crane by the crane-driver? *Answer* : Yes. If so, was such negligence a substantial cause of the accident? 10
Answer : Yes. Damages? *Answer* : £400.

The jury added a rider that " provision should be made for right of " way at the end of the truck farthest away from the end of the crane."

The truck in question was a refrigerated van containing boxes of butter. The van is unloaded from doors on each side. For each 15 side two men inside the truck hand the boxes to two men outside who place them on the tray of the crane. The crane then lifts the boxes on the tray and swings them over to the hold of the ship. The crane on its return trip lands an empty tray to replace the tray taken. A tray carries forty-five to fifty boxes of butter. It was while an empty 20 tray was being lowered into position that the plaintiff tally clerk was struck and injured.

The tally clerk has to pass from the doors on one side of the truck to the doors on the other side to tally each tray load that is sent aboard the ship, and it was while passing from one side to the other that he 25 was struck. It was agreed by counsel that there was no evidence of contributory negligence by the plaintiff.

The further facts sufficiently appear from the judgments in the Court of Appeal.

O. C. Mazengarb, for the plaintiff.

J. F. B. Stevenson, for the defendant Board.

Shorland, for the defendant company.

30 .

Cur. adv. vult.

JOHNSTON, J. [After stating the facts, as above:] It became evident during the hearing that there were two possible outstanding 35 causes of the accident, either that the van by being placed too far under the platform of the crane obscured the view of the crane-driver and the tally clerk, or that the crane-driver let down the tray of the crane too quickly or too perpendicularly.

The position in which the truck or van is placed is determined by the 40 foreman of the watersiders who are employed by the ship-owner to load the butter-boxes into the ship. There is no doubt that if the accident had been caused by a negligent misplacement of the van in relation to the crane the defendant Port Shipping Line would have been liable. While the jury have found that the van was negligently misplaced in relation 45 to the crane, they have found that such negligence was not a substantial cause of the accident. Despite agreement by counsel on the issue as to substantial cause, counsel for the Harbour Board has submitted that such answer is irrelevant and denotes an unwarranted apportionment of blame. I will deal with this question later because the principal 55 issue to which evidence and the subsequent argument on motions for judgment by each of the parties was directed was as to whose servant the crane-driver was in the operation of the crane. The answer to this

question depends on the nature of the contract between the shipping company, who is responsible for the loading, and the Harbour Board, that supplied a crane and the crane-driver.

- The injury complained of in both *Donovan v. Laing, Wharton, and Down Construction Syndicate, Ltd.*(1) and *M'Cartan v. Belfast Harbour Commissioners*(2) arose from the operation of a crane which had been hired to assist in unloading, and it is suggested this case falls within the ambit of one or the other. That is hardly the case because it is quite clear that while the test to be applied must be that laid down by authority its application is governed by the facts of each case: *Lord Wright in Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board*(3). In that case *Viscount Simon, L.C.*, said: " . . . no one disputes the proposition that a man may be in the general employment of X. and yet at the relevant moment, as the result of arrangements made between X. and a third party, may be the servant of the third party as to make the third party and not X. responsible for his negligence, and I agree that the test to be applied is the test formulated by *Bowen, L.J.*, in *Donovan v. Laing, Wharton, and Down Construction Syndicate, Ltd.*, namely, 'in whose employment the man was at the time when the acts complained of were done, in this sense, that by the employer is meant the person who has a right at the moment to control the doing of the act'"(4). In addition, he said: "In his judgment in *Moore v. Palmer* (1886) 2 T.L.R. 781, 782 *Bowen, L.J.*, stated . . . that 'The great test was this, whether the servant was transferred or only the use and benefit of his work'"(5). *Lord Wright*, referring to tests so laid down by *Lord Bowen*, said: "Control is not here taken as the test. There are many transactions and relationships in which a person's servant is controlled by another person in the sense that he is required to obey the latter's directions"(6). Referring to *M'Cartan's* case(7), he said: " . . . the use and benefit of the harbour company's crane and its driver were transferred. The driver of necessity had to obey the directions as to lowering and hoisting given by those conducting the operation, but it was held that there was no transfer of employment"(8). He then illustrates the issue by citing from the judgment of *Lord Herschell, L.C.*, in *Cameron v. Nystrom*(9) who summed up the position as follows: "There was no express agreement with regard to the extent to which the master and mate should have control over them [*sc.*, the stevedore's servants]. That control is only to be implied from the circumstances in which they were employed. The relation of stevedore to ship-owner is a well-known relation, involving no doubt the right of the master of the vessel to control the order in which the cargo should be discharged, and various other incidents of the discharge, but in no way putting the servants of the stevedore so completely under the control and at the disposition of the master as to make them the servants of the ship-owner, who neither pays them, nor selects them, nor could discharge them, nor stands in any other relation to them than this, that they are the servants of a contractor employed on behalf of the ship to do a particular work"(10). Of this summary *Lord Wright* went on to say: "*Lord Herschell* there emphasizes that it is the extent of control which is material to be con-

(1) [1893] 1 Q.B. 629.

(2) [1911] 2 I.R. 143.

(3) [1942] A.C. 509, 513; [1942] 1 All E.R. 491, 497.

(4) *Ibid.*, 513; 494.

(5) *Ibid.*, 516; 494.

(6) *Ibid.*, 516; 496.

(7) [1911] 2 I.R. 143.

(8) [1942] A.C. 509, 516, 517; [1942] 1 All E.R. 491, 496.

(9) [1893] A.C. 308; N.Z.P.C.C. 436.

(10) *Ibid.*, 312, 439.

"sidered, but he also stresses the other elements which make up the relationship of master and servant and which have to be considered before it can be held that there has been a transfer of the man's service from his general employer to the other who is said to be his temporary employer. It is, I think, clear that the presumption is all against there being such a transfer. Most cases can be explained on the basis of there being an understanding that the man is to obey the directions of the person with whom the employer has a contract, so far as is necessary or convenient for the purpose of carrying out the contract. Where that is the position, the man who receives directions from the other person does not receive them as a servant of that person, but receives them as servant of his employer"(11).

The principle to be applied is settled, but it is admitted in some cases questions of nicety may arise in its application to the facts: *Lord Watson in Union Steam Ship Co. v. Claridge*(12). The facts in *Donovan's* case(13) and *M'Cartan's* case(14) may appear to be so alike that one would expect the same application of principle but their distinguishing features have been illustrated in more than one case apart from the distinction made by *Lord Dunedin* himself in *M'Cartan's* case. In that case, speaking of *Donovan's* case, he says: "I do not think it at all necessary to make up my mind conclusively as to whether on the facts I should have come to the same conclusion as the learned Judges did. I rather think I should. But it is very clear that the facts were easily distinguishable from the present case. There the crane and attendant man were lent (I agree that hiring would have made no difference) to the users, and were transferred totally to the borrowers' premises. For the time being the lenders had relinquished all control over the man who worked the machine. Here, I think, and the jury thought, otherwise. And if similarity of facts were a test—which, as I have already said, is, I think, fallacious—then the case of *Cairns v. Clyde Navigation Trustees*(25 R. 1021), decided by the Second Division of the Court of Session, is a case more on all fours with the present than *Donovan's* case. I refer to *Lord Trayner's* judgment in that case, with which I entirely agree"(15).

The judgment of *Lord Trayner* in *Cairns v. Clyde Navigation Trustees*(16) is as follows: "The facts necessary to be considered in the disposal of this question are few, and none of them in controversy. To enable the ship to be loaded, the use of a steam crane was required, and this could only be obtained from the defenders. They have steam cranes at certain berths in the Harbour of Glasgow which they let out, and for the use of which they charge. They do not let out any steam crane except on condition that one of their own crane-men selected by themselves goes to work it, whose wages they pay. If the crane-man acts improperly—as, for example, if he refuses to work at the hours which the stevedore requires, or disobeys any order to him by the stevedore—the stevedore cannot dismiss him, his only remedy being to complain to the defenders, who may, as they think right, either retain the same crane-man at the crane or replace him by another of their own selection. It appears therefore that the defenders have the selection of the crane-man, they pay him his wages, and they alone have the right to discharge him for disobedience or any other reason. I should have thought that these considerations

(11) [1942] A.C. 509, 516, 517; [1942] 1 All E.R. 491, 496. (14) [1911] 2 I.R. 143.

(12) [1894] A.C. 185; N.Z.P.C.C. 432. (15) *Ibid.*, 156.

(13) [1893] 1 Q.B. 629. (16) (1898) 25 R. (Ct. of Sess.) 1021.

- "all pointed to the conclusion that the crane-man was the servant of the defenders. What other material element is there in the relation of a master to his servant beyond the appointment, payment of wages during the service, and termination of the service at pleasure ?
- 5 "But the defenders maintain that the crane-man was the servant of the stevedore. It is difficult to see how this could be. The stevedore entered into no contract of employment or otherwise with the crane-man ; the stevedore did not ask the defenders for their crane or crane-man ; he did not know what crane-man was to work the
- 10 "crane or whether the same crane-man would be at the crane for two consecutive days. That all depended on the pleasure of the defenders, and all that is inconsistent with the idea of the crane-man being the servant, or, in any proper sense, under the control of the stevedore. Nor, for the same reasons can it be said that the crane-man was the
- 15 "servant of the ship-owner. But if not the servant of the ship-owner or of the stevedore, then he must have been the servant of the defenders"(17).

- In the *Cairns* case I think the judgment of the Lord Justice-Clerk is instructive. Referring to a crane-man's work he says : "In
- 20 "doing that work he was necessarily to some extent under control, because until the parties to whom the goods belonged, or who had charge of the goods, were ready for him to hoist from either place he would be wrong in hoisting, and therefore they had to indicate to him when he was to proceed to do his work. But then if they gave him
- 25 "a signal that was not giving him an order, but merely indicating that the time had come for him to do the work for which he was employed, and when he did that work and could see the load he was lifting he did it by the exercise of his own skill. Then again, he might to some extent be under the control and subject to what may be called 'orders' if
- 30 "the load was out of his sight at the particular time—that is to say down in the hold—when the chain or rope was going up or down. In such circumstances he would require the assistance of someone in doing his work to guide him when to raise and when to lower. But these things do not appear to me to indicate that he was subject to the
- 35 "orders of anyone but his own master"(18).

- Speaking of the relation between the Clyde trustees and the stevedore, the Lord Justice-Clerk concluded : "All he [the stevedore] can do is to accept the man they offer, who is their servant ; and if that
- 40 "man does not do the work properly, or if the shipowner is dissatisfied with him, he can try to get the Clyde trustees to give him another man, and if in the meantime he requires to stop work that may give rise to a question of damages. But that he has any control over him in the sense of service I cannot hold"(19).

- The same distinctions are made and applied in *Ainslie v. Leith Dock Commissioners*(20), where *Donovan's* case(21) and *M'Cartan's* case(22) were considered and Lord Trayner's judgment approved. It is unnecessary, I think, to emphasize the fact that in this case the crane was not transferred to the hirer's or borrower's property so that the owner lost complete control of it. Here, as in *M'Cartan's* case, I think
- 50 "it must on the authority be held that there was not a transfer of the servant, but no more than a transfer of the use and benefit of the crane and the crane-man who worked it. To my mind the so-called "orders"

(17) (1898) 25 R. (Ct. of Sess.) 1021, 1023, (20) [1919] S.C. (Ct. of Sess.) 676.
1024.

(18) *Ibid.*, 1027, 1028.

(19) *Ibid.*, 1028.

(21) [1893] 1 Q.B. 629.

(22) [1911] 2 I.R. 143.

were directions. The use of the driver of the crane is practically obligatory. He is a skilled man chosen by the Harbour Board in their own interest and the position of the parties and the scope of directions does not in practice ever differ. It is true, of course, a special arrangement could be made. It is not suggested that any special agreement or arrangement was made in this case. It is not necessary, therefore, to follow Mr. *Stevenson's* traverse of the evidence as to what those directions might be. It really amounts to no more than a slightly amplified recital of the mode of loading and the usual directions given to a crane-driver which appear in all those cases where trustees of a dock gave the use of their crane and supplied the driver which have been referred to and which are referred to in *Hayes v. Union Steam Ship Co.*(23), where the Chief Justice, *Sir Michael Myers*, decided that the employer of the crane-driver was the Harbour Board.

It is said in the cases that the question is one of fact ; but *Lord Hunter* in *Ainslie v. Leith Dock Commissioners*(24) regards it as a mixed question of law and fact. This, I think, must be so. The facts to be found by the jury must be those necessary to establish the degree of control exercised by the parties and those necessary to establish the arrangement made as to the use of the crane and its driver. The relationship that then arises between crane-driver, Harbour Board, and ship-owner is a question for the Court and, since all the facts upon which this conclusion can be reached are admitted, the question of whose servant the driver was—that is, was there a transfer of the servant or only the use and benefit of his work ?—is for the Court. That is the case here, and must have been the case in *Hayes v. Union Steam Ship Co.*(25), where the Chief Justice nonsuited the plaintiff without leaving any question to the jury.

The question as to whether it was right to have left to the jury the second question in issue 1—namely, “If so, was such negligence a substantial cause of the accident ?”—was I think justified by the course taken at the trial and I think properly agreed upon by counsel. It is on reflection subsequent to the verdict that counsel for the Harbour Board has raised the question of its propriety. That plaintiff was entitled to damages, and that there was negligence somewhere, was in essence admitted. Whether it was due to the use of the crane or the position in which the crane was placed by the stevedore was the predominant issue: this was the concern of the defendants. The plaintiff was satisfied with a judgment against both or either of them.

The object of each defendant was to avoid a finding that there was joint negligence. The issue was really to enable the question between the defendants to be decided. By it the jury were enabled to determine whether if there were negligence by both, whose negligence was the real and effective cause of the accident, and on the direction given to them they could only have understood it in this way. On the evidence it was apparent that the accident could have been caused either by faulty management of the crane or misplacement of the crane and that there were separate functions of different people. Although there might have been negligence in the exercise of both functions as they were not joined and of necessity not connected, the question as to whose negligence was responsible was necessary. The jury can have had no delusions as to its meaning, which, in my opinion, was made clear by the use of the

(23) [1936] N.Z.L.R. 943.

(24) [1919] S.O. (Ct. of Sess.) 676.

(25) [1936] N.Z.L.R. 943.

word "substantial." The authority cited in *Devlin v. Belfast Corporation*(26) is not, I think, opposed to this conclusion.

For these reasons judgment will be for the plaintiff against the defendant Harbour Board, with costs, witnesses' expenses and disbursements according to scale and one extra day, £15 15s. Judgment will be entered for the defendant shipping company with costs, witnesses' expenses and disbursements according to scale and one extra day, £15 15s., to be paid by the Harbour Board.

From the whole of the foregoing judgment, the defendant Harbour Board appealed, upon the ground that it was erroneous in law and fact.

In the Court of Appeal,

J. F. B. Stevenson, for the appellant.

O. C. Mazengarb, for Tollan, the first respondent.

Watson and Shorland, for Port Line, Ltd., the second respondent.

Stevenson, for the appellant. His Honour held that the finding of the jury to issue 1 meant, in effect, that there was no negligence on the part of the shipping company, and dismissed it from the action(1).

A. At all relevant times the crane-driver was the servant of the defendant shipping company, and the shipping company was responsible for any negligent act committed by him. The Board under By-laws 188 (b) and 190 of the Wellington Harbour Board By-laws, 1935, hires its cranes to persons having use for them. The facts show that the shipping company had full control of the crane both going to and coming from the ship; and it had also the control of the crane-driver over the whole of the operations, during which, though he was a general servant of the Harbour Board, he became a servant of the shipping company by virtue of the control disclosed by the evidence. The learned Judge wrongly endeavoured to apply the facts of other cases to the operations on the Wellington wharves(2).

The Harbour Board was not a party in *Hayes v. Union Steam Ship Co. of New Zealand, Ltd.*(3). The crane-driver was directed by a hatchman employed by the defendant company, and at all times the crane-driver had the working of the crane(4); but the evidence as to the degree of control was held insufficient to change the employment. This case is distinguishable on the facts.

The latest expression of the test of control to be applied—i.e., who had the right at the relevant moment to control the crane-driver—is found in *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board*(5), adopting the test formulated in *Donovan v. Laing, Wharton, and Down Construction Syndicate, Ltd.*(6). Here, at no time was the crane-driver out of control of the shipping company. The Harbour Board is not, therefore, liable for the negligence of the crane-driver. The question of control is one of degree, and here the crane-driver was at all material times under the directions of the shipping company by its servants. For the time being, he was under the complete control of that company, which directed the manner in which his work was to

(26) [1907] 2 I.R. 437, 450.

(1) *Ante*, p. 80, l. 42.

(2) *Ante*, p. 82, l. 12.

(3) [1936] N.Z.L.R. 943, 944.

(4) *Ibid.*, 944, l. 9.

(5) [1942] A.C. 509, 513; [1942] 1 All E.R. 491, 494.

(6) [1893] 1 Q.B. 629, 633.

be done, including in that work the act which caused the injury. The facts in *Donovan's* case are indistinguishable from the present one; and in that case *Lord Wright* said that the question is one of fact(7). The test of control was applied in *Bain v. Central Vermont Railway Co.*(8), which referred to *Societe Maritime Francaise v. Shanghai Dock and Engineering Co., Ltd.*(9); and see *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board*(10) and *A. H. Bull and Co. v. West African Shipping Agency and Lighterage Co.*(11), all of which derive from *Rourke v. White Moss Colliery Co.*(12). *G. W. Leggott and Son v. C. H. Norman-ton and Son*(13) may be referred to. From these cases, it is clear that the principle has been applied from 1855 onwards, including the applica-tion of *Donovan's* case(14) in *O'Leary v. Certified Concrete, Ltd.*(15). The most recent applications of *Donovan's* case have been *Dowl v. W. H. Boase and Co., Ltd.*(16) and *Nicholas v. F. J. Sparkes and Son*(17), which, though distinguishable on the facts as no stationary machinery was used, show that the right of control is the test as to who is to be deemed the employer at the time of the accident; and that the question of control is a question of fact. *M'Cartan v. Belfast Harbour Commis-sioners*(18) (a crane case) was decided on its particular facts, and it was left to the jury who found the control remained with the defendants. Here the question of control should have been left to the jury, which in itself was non-direction amounting to misdirection.

[To CORNISH, J.] A general view must be taken on the whole opera-tion, and the inquiry is whether there has been a transfer of control over the negligent act.

Cairns v. Clyde Navigation Trustees(19) is similar on the facts to *M'Cartan's* case, as the stevedore had no control apart from directing the crane-driver to raise or lower the crane. In *Ainslie v. Leith Dock Commissioners*(20), the crane-man used his own discretion, in carrying out his orders, and there was no signal given to him by any one. The Scottish cases should not be followed.

B. The answers to issue 1 were a finding by the jury that injuries caused to the plaintiff were caused by the negligence of the shipping company. Any ambiguity is due to the wording of the issues.

[FAIR, J. The issues were agreed upon by counsel(21).]

There is no finding that the negligence found was exclusive to the Harbour Board. The placing of the truck was a cause contributing to the accident. As between defendants, there are no degrees of negli-gence. The question of "substantial cause" can only arise as between a plaintiff and a defendant, both of whom are guilty of negligence when contributory negligence is pleaded. It cannot provide a test of liability between two defendants. The question for the jury is whether the defendant was negligent, and, if both defendants are liable, whether their negligence was caused by the combined negligence, even though the negligence of one had been unsubstantial. There was no finding

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| (7) [1942] A.C. 509; [1942] 1 All E.R. 491. | (15) Unreported 1943 No. 476, Wellington: Myers, C.J. |
| (8) [1921] 2 A.C. 412. | (16) [1945] K.B. 301, 302, 306, 308; [1945] 1 All E.R. 605, 608. |
| (9) [1921] 2 A.C. 417; 90 L.J.P.C. 85. | (17) [1945] K.B. 309n.; 61 T.L.R. 311. |
| (10) [1942] A.C. 509, 513; [1942] 1 All E.R. 491, 494. | (18) [1910] 2 I.R. 248; on app. [1911] 2 I.R. 143, 145, 146, 147, 150. |
| (11) [1927] A.C. 686, 691. | (19) (1898) 25 R. (Ct. of Sess.) 1021, 1022. |
| (12) (1877) 2 C.P.D. 205. | (20) [1919] S.C. (Ct. of Sess.) 676, 678. |
| (13) (1928) 98 L.J.K.B. 145. | (21) <i>Ante</i> , p. 80, l. 22; p. 80, l. 47; p. 84, l. 32. |
| (14) [1893] 1 Q.B. 629. | |

that the accident was due to the sole or exclusive negligence of the Harbour Board: *Biggs v. Woodhead*(22) and *Salmond on Torts*, 10th Ed. 451.

The defendant Harbour Board is entitled to judgment, or, alternatively, to judgment that the defendants are jointly liable, or that there should be a new trial, because on the issues, if the shipping company is exonerated, it is impossible to say that justice has been done as between the defendants. The jury has not found that the crane-driver's negligence was the sole cause of the accident. Their rider(23) showed that the position of the truck was a contributing cause of the accident. The shipping company was, therefore, in terms of the answer and rider, solely liable.

Where there are two defendants it is not proper to put to the jury an issue as to whose negligence was the substantial, or real and effective, cause of the accident. The proper issue to put is that in *Mathews v. London Street Tramways Co.*(24), cited in *Biggs v. Woodhead*(25) and in *Lynam v. Dublin United Tramways Co. (1896), Ltd.*(26), and in *Devlin v. Belfast Corporation*(27).

C. If the answers to issue 1 do not amount to a finding that the negligence of the shipping company was a cause of the injuries suffered by the plaintiff, (i) the issues were not framed in a manner to enable the jury to give a proper finding, or (ii) the finding was against the weight of evidence. [Reviews the evidence.] The learned Judge has held that the jury's answer to issue 1 amounts in effect to a verdict that there was no negligence on the part of the shipping company. The placing of the truck was an effective cause of the accident, but the learned Judge's direction(28) was to distinguish if there was negligence by both, the jury had to find whose negligence was the real and effective cause of the accident. But the accident could not have happened unless the truck had been placed under the platform of the crane, and this was the fault of the shipping company alone.

O. C. Mazengarb, for the respondent Tollan. There should not be a new trial. The plea of contributory negligence against the plaintiff was not persisted in, and it was abandoned when it was agreed that no issue should be put as there was no evidence to support it. If the plaintiff had to submit to a new trial because of a dispute between two defendants, it would be unfair to the plaintiff. Either the judgment should stand, or, alternatively, the subsidiary issues as to substantial cause should be ignored, and the judgment would stand against the two defendants, who can then contest the question of contribution arising between them. The plaintiff's case should not be complicated by two questions which could only arise between two defendants in a contribution action. If one of them had been impecunious, the plaintiff's position would be similar to that of the plaintiff in *Devlin v. Belfast Corporation*(29).

Watson, for the respondent Port Line, Ltd. The only question for determination is whether or not the learned trial Judge's decision that the crane-driver was the servant of the Harbour Board at the material time is correct. All the other matters, to which Mr. *Stevenson* has directed argument, are not open to him on this appeal. This appeal does not arise from a motion for a new trial, on the grounds of misdirection, defective issues, or that the verdict was against the weight of

(22) [1940] N.Z.L.R. 108, 118, 119, 120. (26) [1919] 2 I.R. 445.

122.

(23) *Ante*, p. 80, l. 12.

(24) (1888) 60 L.T. 47.

(25) [1940] N.Z.L.R. 108, 119.

(27) [1907] 2 I.R. 437, 450.

(28) *Ante*, p. 84, l. 41.

(29) [1907] 2 I.R. 437.

evidence. The only proceeding subsequent to the verdict was an oral motion for judgment on the jury's findings. No application for a new trial has been filed or argued.

The only defendant in the original writ was the Harbour Board, against whom alone any claim was made. It was only after the Harbour Board had filed its defence, that the defendant shipping company was joined as a defendant. Each defendant at the trial took the course of putting the blame on the other. Joint negligence was ignored by the defendants; and neither can subsequently complain if an issue of joint negligence was not put to the jury. Consequently, neither defendant can complain if the issues were shaped according to its conduct of the case, and not shaped to meet a charge of joint negligence which each had repudiated. Neither would entertain any question of joint negligence. Consequently, the issues were correctly put. It cannot now be questioned that counsel for the Harbour Board did argue on the form of the issues put to the jury and raised no question about them until after the verdict had been given(30). The word "substantial" can only be questioned if the issue were being framed to meet a contest as to joint negligence. If the issue was whether one or other defendant was solely liable, the use of the word "substantial" cannot be questioned.

No issue was asked for by the Harbour Board as to whether the crane-driver was the servant of the Harbour Board at the time of the accident. That question was left to the learned Judge to determine. Accordingly, the learned Judge has found the necessary facts, and has attached the proper legal consequences to those facts. Even if the Harbour Board had asked for an issue as to those facts (which it did not), there was no need for an issue as the facts therein were not in dispute. Crane-drivers are always the servants of the Harbour Board. The Harbour Board admitted in its statement of defence that the crane-driver was a servant of the Board, subject to the qualification of the direction of the hatch-man and watersiders. The evidence shows that the operation of the crane, which caused the accident, was without any order, direction, or signal given by any one to the crane-driver, but was entirely of the crane-driver's own motion.

Once it is admitted that the crane-driver was the Board's servant before the hiring of the crane, there is a legal presumption that such a relationship continued during the hiring of the crane, and there is a strong onus on the Harbour Board to displace that presumption: *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board*(31). The test of control in *Donovan's* case(32) has been explained in that case(33). The more concise criterion is stated in *Moore v. Palmer*(34). The burden of proof is on those who assert that the services of a workman were transferred to a person other than his regular employer: *Dowd v. W. H. Boase and Co., Ltd.*(35), and *Nicholas v. F. J. Sparkes and Son*(36). The crane is the property of the Harbour Board, and is situate on its property. Even during the working of the crane, or in stopping its work, the Board retains the right of control while it is subject to hiring.

Under By-law 188 (d), the hirer must take the crane-driver given to him by the Board; and he has no right to terminate the driver's employment, and has no disciplinary control over him. The hirer

(30) *Ante*, p. 80, l. 4; p. 80, l. 47; (33) [1942] A.C. 509, 515, 516; [1942] p. 84, l. 32.

(31) [1942] A.C. 509, 515, 516, 517; (34) (1886) 2 T.L.R. 781.

[1942] 1 All E.R. 491, 495, 496. (35) [1945] 1 All E.R. 605, 607.

(32) [1893] 1 Q.B. 629. (36) [1945] K.B. 309n.; 61 T.L.R. 311.

cannot withdraw the driver or substitute another driver. The acts of negligence charged against the driver were threefold, (a) landing the load too fast, (b) landing it "too perpendicularly," and (c) landing it without waiting for a signal, all being acts going to his method of operation, and indicating his lack of skill or care. It would be anomalous for the hirer to be held liable, when, in law, the hirer is powerless to prevent or restrain a crane-driver's negligence. It is admitted in the evidence that the hirer's only remedy, if dissatisfied, is to complain to the Harbour Board.

- 10 To the extent that the question, as to whose servant the driver was at the material time, is one of fact, it was left to the Judge to find on it; since no issue was put respecting it, and his subsequent finding precludes the Harbour Board from traversing those facts in this case. In *Hayes v. Union Steam Ship Co. of New Zealand, Ltd.* (37), the Harbour Board, crane, and method of operation were the same; and it was there found that the accident occurred during the time when the crane-man was bound to take his instructions from the hatch-man, so that in each case the accident occurred while some one should be giving signals to the crane-driver. It was held that the negligence was that of the Harbour Board, and not of the shipping company, against whom there was no evidence.

- As to whose servant the crane-driver was: With the exception of *Donovan's* case (38), in every other case on facts similar to this case the decision has been that the crane-driver was the servant of the crane-owner and not of the hirer. *Donovan's* case (39), which must be restricted to its own facts, is distinguishable in that the hirers there had a right to discharge the crane-driver if he were found misconducting himself; and the crane was operating upon the ship-owner's wharf and the ship-owner hirers had the choice of drivers from a number of drivers. The test that prevails is that stated in *Moore v. Palmer* (40)—viz., whether the servant was transferred or whether the use and benefit of his services were transferred. This principle was applied in *M'Cartan v. Belfast Harbour Commissioners* (41), *Cameron v. Nystrom* (42), *Cairns v. Clyde Navigation Trustees* (43), *Ainslie v. Leith Dock Commissioners* (44), *Dowd v. W. H. Boase and Co., Ltd.* (45), and *Nicholas v. F. J. Sparkes and Son* (46). In all those cases, *Donovan's* case was distinguished on the facts. They all rely on the legal relationship of master and servant, the *indicia* of which are the right to hire, the right to control, and the right to dismiss. In *Bain v. Central Vermont Railway Co.* (47), the plaintiff was separately employed and paid by each of the two companies, and it was clear his employer at the time of the accident was the company which had employed and paid him.

- If an issue is not asked for on a question of fact, it is impliedly left to the trial Judge to decide it: *Brett v. Schneideman Bros., Ltd.* (48). Where issues have been agreed to by counsel, he cannot later complain of their form: *Seaton v. Burnand* (49), *Nevill v. Fine Arts and General*

(37) [1936] N.Z.L.R. 943, 945.

(38) [1893] 1 Q.B. 629.

(39) *Ibid.*, 632.

(40) (1886) 2 T.L.R. 781, 782.

(41) [1911] 2 I.R. 143, 145, 151.

(42) [1893] A.C. 308, 312; N.Z.P.C.C. 436, 439.

(43) (1898) 25 R. (Ct. of Sess.) 1021, 1023, 1026, 1027.

(44) [1919] S.C. (Ct. of Sess.) 676, 677, 680, 681, 682.

(45) [1945] K.B. 301, 302, 305; [1945] 1 All E.R. 605, 607.

(46) [1945] K.B. 309n.; 61 T.L.R. 311.

(47) [1921] 2 A.C. 412.

(48) [1923] N.Z.L.R. 938, 959, 960, 976, 977.

(49) [1900] A.C. 135, 143.

Insurance Co.(50), *Black and White Cabs, Ltd. v. Anson*(51), and *Kenealy v. Karaka*(52). The issue refers to "a substantial cause," but, even if it had been "the substantial cause," it would not have been appropriate so to frame the issues, having in mind the course and conduct of the trial.

As to the framing of the issues, which is not objected to: The two acts of defendants in the present case were not contemporaneous in time and intermingled in circumstances as in *Biggs v. Woodhead*(53), since the respective acts of negligence here were separated by a considerable difference in time and were totally distinct in circumstances. The act of negligence of the shipping company (the placing of the truck) occurred at least an hour before the accident, of which it was not a cause, and this earlier negligence was spent before the accident happened.

In *Devlin v. Belfast Corporation*(54) the trial Judge had refused to put the issue whether the accident had been caused by combined negligence, and a new trial was granted: here, counsel all agreed as to the issues. The appellant cannot now ask for a new trial on an issue that was not considered or contemplated at the trial.

The rider of the jury does not refer to the placing of the truck in a position that created danger, but to the wisdom of placing it so that there would be left a safe passage-way behind it, and it had no relation to negligence on the shipping company's part at the material time.

Stevenson, in reply. Since *Donovan's* case(55), the crane-driver was held not to be the servant of the crane-owner in both *Cairns v. Clyde Navigation Trustees*(56) and *Connolly v. Clyde Navigation Trustees*(57). By-law 188 (d) of the Harbour Board provides for direction of the hirer, and not of the crane-driver.

Cur. adv. vult.

BLAIR, J. In considering this appeal it is essential that regard be given to precisely what was found by the jury, and against whom it was that negligence was found. In the Court below, as the result of the jury's verdict, judgment was given for the plaintiff as against the Harbour Board for the amount found by the jury. The Harbour Board appeals from that judgment in so far as the judgment freed the shipping company from liability to the plaintiff. The Harbour Board also claims that the shipping company is solely liable to the plaintiff upon the ground that the negligence of the crane-driver in the circumstances of this case had passed from the responsibility of the Harbour Board to the responsibility of the shipping company.

It must not be forgotten that the only causative negligence found by the jury was negligence on the part of the crane-driver and by him alone. It is true that the jury found that it was negligent to place the railway truck in the position it was, but the sting, if there was any in that finding, was taken out of that answer by the jury's answer to the second portion of the first question when they found that the negligence in the positioning of the truck was not causative negligence *quoad* the accident to the plaintiff.

In order to understand the jury's reference to the positioning of the truck, it is necessary to know that the cargo to be loaded on the ship was butter in boxes, carried on closed railway box-wagons: that a

(50) [1897] A.C. 68, 75, 76.

(51) [1928] N.Z.L.R. 321, 330.

(52) (1906) 26 N.Z.L.R. 1118, 1128.

(53) [1940] N.Z.L.R. 108.

(54) [1907] 2 I.R. 437.

(55) [1893] 1 Q.B. 629.

(56) (1898) 25 R. (Ct. of Sess.) 1021.

(57) (1902) 5 R. (Ct. of Sess.) 8.

"rake" of these wagons is brought to the ship's side, and as one truck is emptied another truck is pulled into its place convenient to the ship's hold being loaded: that the watersiders working on the wharf perform this operation of shifting trucks into position as required, and do so by means of hydraulic capstan gear installed at intervals on the wharf.

It was suggested at the hearing that the position of the truck being unloaded at the time of the accident to the plaintiff was such that, when the empty cargo-tray was being brought back from the ship on to the wharf to be reloaded, it would obscure the crane-driver's view of the tray on its journey down to the wharf. It was suggested that this obscuring was the cause of the accident and had permitted the crane-driver to lower the cargo-tray on to the plaintiff's head and so injure him.

The jury's finding that the positioning of the truck was negligent, coupled with its further answer that such negligence was not a substantial cause of the accident, would no doubt mean that in the jury's view there was an element of danger in the positioning of the truck, but that, as a matter of fact, that element of danger was not a factor in the happening of this particular accident to the plaintiff. That being so, the jury's finding to the first issue becomes irrelevant to the question which arises in this appeal, because this appeal concerns the question as to whether the crane-driver when he was negligent, as found by the jury in its answer to the second issue, was not acting as a servant of his permanent employer—the Harbour Board—but was acting as, the servant of the ship or the Waterfront Control Board, both of whom are for certain purposes the employers of the watersiders employed as watersiders loading the butter on the early morning of the accident to the plaintiff.

There was no finding by the jury as to the details or the elements of the negligence found by them in their answer to the third issue, but from an examination of the evidence in the case the nature of such negligence can be ascertained with reasonable certainty. That is the first point for inquiry. The second point for inquiry is as to who it was that possessed the control of the crane-driver at the moment of the accident.

Upon the jury's findings it is not possible for whomsoever is the employer of the crane-driver at the moment of the accident successfully to dispute that judgment must in this action be given against him in favour of the plaintiff. Consequently, therefore, a crucial point in this case is who was the employer of the crane-driver when he did or left undone the operation which resulted in the hurt to the plaintiff, and, as the jury has not indicated what act or neglect constituted that negligence, we have to look to the evidence to see which it was.

I now turn to the evidence to see whether we can get a definite answer to that question. The plaintiff, Tollan, was tallying boxes of butter which were being loaded on to the cargo-tray by the gang of waterside workers. It was about 6 o'clock in the morning of January 7, 1945. The butter which Mr. Tollan was tallying was lifted by hand by the watersiders out of both the doors of the truck. These doors are big sliding doors, one on each side of the truck, and sometimes the butter would be coming out of one side of the truck, and sometimes out of the other side. If the unloading of the truck changed from one side of the truck to the other, then Tollan would walk around the back end of the truck where it projected some little distance under the framework of the crane. The crane-man, towards the finish of the loading

of one tray, would be engaged in bringing an empty tray from the ship and placing it on the other side of the truck from that on which the loaded or partly-loaded tray was waiting. The plaintiff does not remember how he was struck. All he knows is that as he was coming from the door on one side of the truck to the door on the other side of the truck he was struck by the empty tray being lowered on to the wharf. This happened when he emerged from underneath the overhanging platform of the crane on his way to the doorway of the truck. 5

I turn now to the next witness for the plaintiff, one Haase, who was one of the gang of watersiders loading boxes of butter on to the cargo-trays. He gives a detailed description of the course followed in unloading from the railway truck and unloading into the hold of the ship; but as the accident to the plaintiff occurred when an empty tray was coming down towards the wharf after having been unloaded into the ship, I will confine my particular attention to that phase of the operations. Haase says that, before the watersiders would give any direction to lift the tray, it had to be loaded and checked. There would be fifty-odd boxes on a full tray. From the position the crane-driver was in he could see the full tray, and he could see the tally clerk—i.e., the plaintiff. The crane-driver would be able to see the full tray quite easily, as it would be by the doors of the truck, and he would land his empty tray in the vicinity of the full tray. Haase was asked whether there was any cause for complaint in the way the trays had been landed, and he answered: 15

Early in the morning my mate called out to the crane-driver asking him to come down slower. That was previous to the accident. He said: "You will injure somebody if you don't come down slower" 25

Haase then added:

As he [the plaintiff] came through the passageway the crane-driver was coming down with the tray and my mate called out, "Look out," "Steady up," or something, and the tray hit Tollan on the head and knocked him over. When this tray came down the jib was practically perpendicular in my opinion and the tray just cleared the edge of the platform in my opinion. It was coming down pretty fast. That was the closest that night that the tray had come to the crane. The tray just missed the platform of the crane. My mate sung out, "There you are now, you have either killed a man or knocked a man." I would not be sure of the words. I think he said, "You have killed a man." There was no reason whatever why the tray had to be brought down so close as that. When my mate sung out that he had killed some one the crane-driver sung out, "I can't see there what he is doing there," or some words to that effect. The crane struck him on the top of the head and that knocked him against the side of the crane. And then the tray struck him in the back and he fell forward. My mate then caught him and we then carried him away. 30

It is to be observed that if we take the witness Haase's version, the crane-driver came down too fast and did that notwithstanding the fact that he had had a warning earlier in the evening. The speed at which the tray came down was selected by the crane-driver himself, and was certainly not brought down pursuant to any orders from the watersiders working on the wharf—assuming they had a right to give him orders. 35

Upon the subject of landing empty trays on the wharf, the witness Haase said: 40

Question: There is a suggestion the crane-driver should give a warning before he brings a tray down? *Answer:* Not all the time. If they are working in a narrow space I have heard the crane-drivers give a warning. 50

Question: In the great majority of cases, ninety-nine times out of a hundred, the crane-drivers land without a word? *Answer:* They use their own discretion. They very often give a warning. It was not only dangerous to us or the tally 55

clerk, but also to any one leaving the ship. . . . The crane-driver had a full vision of the door and could see us.

Again, Haase says :

5 *Question* : Was any signal given by any of your gang for the crane-driver to come down on this particular occasion ? *Answer* : None whatever. . . .

Question : When a tray comes down it stops some feet off the wharf ?

Answer : Yes ; that is so, we can get hold of it and shift it. Had Tollan not been struck it would have been stopped within the next 2 ft. or 3 ft. If Tollan had not been there, we would have pulled it into position.

10 Mr. Byrnand, a watersider, was the next witness, and he said in relation to trays coming down :

He was landing the trays near the centre of the truck near the doorway. He could see that position from the cab of the crane. I saw the empty tray coming down that came in contact with Tollan. That was not brought down at a request.

15 from me. That particular tray was brought down with the jib in a practically perpendicular position. In my opinion that crane-driver could not see where he was going.

That was the end of the plaintiff's case. The two following witnesses were called for the defendant Harbour Board. Mr. Blumen, the assistant

20 traffic manager, formerly assistant wharfinger, who has had twenty-six years' experience on the wharf, says that after the cranes are placed, then the crane and the driver are entirely working under the jurisdiction of the shipping company. The evidence of the other witnesses, it is submitted, establishes affirmatively that the crane-driver certainly in
25 the bringing down of trays exercises his own discretion as to the speed and position in which they will come down. That evidence establishes that the crane-driver brings the empty tray down to within a few feet of the wharf, and then waits for the watersiders there to take hold of it and guide it into any position they want it. It is plain, therefore, that the
30 whole operation of the crane in the matter of bringing empty trays to the wharf is in the sole charge of the crane-man.

In the evidence reference is made to a man known as a hatch-man whose place is on the ship alongside the hatch into which cargo is being lowered. Once the cargo is suspended above the hatch, then the hatch-
35 man gives the directions as to lowering, because he can see down the hatch and the crane-man cannot. That part of the operation does not, however, come into question in this case, because the accident occurred in connection with the returning of an empty tray to the wharf for re-loading. Mr. Blumen really is, in some parts of his evidence, attempting
40 to instruct the Court as to the legal position. He knew nothing personally about the plaintiff's accident.

In cross-examination, Mr. Blumen said to Mr. Mazengarb :

Question : Now then, you would say, I suppose, landing and taking off from the wharf . . . lowering on to the wharf you don't need a signalman because the
45 assumption is the crane-driver will be able to see for himself ? *Answer* : Yes.

Question : And therefore he should not lower his tray into a position he cannot see without any instruction from the men on the wharf ? *Answer* : Yes.

Question : That is just a matter of common sense ? *Answer* : Yes.

Question : But if the operations had been conducted in a way that required
50 him to lower down into position where he could not see there should be a signalman or something to give him instructions ? *Answer* : As a rule the men on the wharf did that.

Question : Some one on the wharf instructs him ? *Answer* : Yes.

The next witness called by the Harbour Board was the crane-
55 man, Peter Henderson. He says that he had to cock the jib of the crane to go past the ship's head, and that as it came over from the ship he started to lower the jib, and the tray was coming across and lowering

simultaneously. He says that while coming out of the ship he was under the direction of the ship's hatch-man, but when everything was clear the jib was pretty nearly in position. Coming across from the ship he passed 3 ft. or 4 ft. over the truck, and he would then be about 16 ft. up in the air. He would then stop a little and come on slowly. He was a bit away from the other tray. When he was about a foot or 6 in. off the wharf he would usually hold it there for the watersiders to move it where they wanted it. He said that he could not see anything under the tray, but he could see the empty tray that he was lowering. The crane-driver states that the trays are 4 ft. 6 in. square. He said he was lowering very slowly and watching for the watersiders to come over and put the tray in position. He would then land the tray alongside the other one, but he could not see any one who might step out from under the platform of the crane. (This platform he speaks of is practically a steel roof over the base of the crane and it is high enough for the train and trucks to pass under it.) He said that during the lowering operation a watersider named Connor called out "Look out." Henderson then adds:

Of course I stopped the crane there and then. When you let the lever go it just swings back to neutral. The call was "Look out." I suppose from the time I heard the call until the time I stopped the crane would be a second.

Henderson says that Connor said to him after the accident,

You are coming too fast,
and he added:

The tray comes down in the same position all the time—right alongside the truck. As you come down over the crane you let it swing out from the ledge a little.

He says:

I had lowered it [the tray] to 5 ft. or 6 ft. off the wharf before I heard the call "Look out."

Question: From that call the man who was emerging had no chance to avoid the tray? *Answer:* No.

Question: If he was not in your view, he must have been under the tray? *Answer:* Yes; I carry on lowering to that distance all the time.

Question: You had been carrying on like that all the evening landing the trays when you could not see? *Answer:* Yes; when I could not see underneath the tray.

Question: And in no case did you receive a signal that all was clear? *Answer:* Yes.

(The witness means by his affirmative answer to that question that in no case had he received a signal that all was clear.)

In re-examination this witness said:

Question: You came down on this occasion without a signal? *Answer:* Yes.

Question: What is the practice? *Answer:* I come down and wait for the wharfies to put the tray in position. I do that without any signal. They generally say "Hold it up there" by signalling with their hand. If I don't get a signal I hold the tray in a position where they can handle it.

The next witness, a stevedore named Nicholson, called for the shipping company, was not present at the time of the accident, and in that respect his evidence is like that of Mr. Blumen. He said to the question,

If you are dissatisfied with the manner in which a crane-driver operates his crane, to whom do you go about that? *Answer:* To the foreman in charge of the Board.

To the question,

Who controls the time for his relief by the relief man? A. The relieving man has four to relieve, and he would start from No. 1 crane. The Harbour Board foreman has an office on the wharf. As a rule there is a Harbour Board foreman allotted to every ship wanting cranes, unless it is only a small job.

- 5 A good deal of this witness's evidence concerned the duties of the hatch-man who is positioned on the ship and gives the necessary signals as to lowering cargo down the hold. This accident occurred when an empty tray was being lowered on to the wharf, and the hatch-man is apparently only concerned with that while it is coming out of the hold.
- 10 He said that the crane-driver is subject to the signals of the hatch-man while over the ship, and is subject to the signals of the watersiders when the crane is over the wharf. He said :

The crane-driver knows there are two men working that tray and he looks for them to guide him where he is going.

- 15 *Question* : If the Harbour Board had a man there for signalling he would have to ask the watersiders where they wanted it and so forth? *Answer* : Yes.

He added that it was never the practice to have an extra signalman on the wharf.

- Question* : Your point, Mr. Nicholson, is that there is no need for a signalman on the wharf because the crane-driver lowers to the top of the truck and then awaits directions from the men? *Answer* : That is correct. There is no need for a signalman.

Question : Is there any danger coming across the top of the truck? *Answer* : No.

- 25 *Question* : From the time the tray is above the top of the truck the crane-driver is subject to the signals of the men and should not lower his tray until they signal to him? *Answer* : Yes.

- That constitutes the whole of the material evidence relating to the method of lowering empty trays on to the wharf, and it is clear that
- 30 from the evidence two watersiders would be loading boxes on to the tray after it had been positioned on the wharf. The crane-man brings it out of the hold as signalled by the hatch-man, but thereafter the crane comes across positioned so as to lower the empty tray on to the wharf in the place indicated by the men who are destined to load it.
- 35 These men no doubt would select a position handy to the doorway of the truck so as to shorten the distance that the boxes would have to be carried from the truck to the tray. The whole of this crossing from the ship and lowering down to the wharf, up to the moment when the crane-driver stops the lowering at a distance of 2 ft. or 3 ft. from the wharf
- 40 ready for the watersiders to pull it into a position they require it, is in the charge of the crane-man. Any directing that is to be done in respect of getting the tray out of the hold is done by the hatch-man who stands by the coamings of the hatchway and can see the tray from the moment it leaves its position in the hold until it is hoisted clear of
- 45 it. All the operations from the moment the crane leaves the hold are clearly left to the discretion of the crane-driver.

- The most that could be referred to as constituting directions from the watersiders on the wharf would be that it is left to them to point out where they want the tray to land, so as to suit their operations of putting
- *50 boxes of butter on it. A crane-driver is, of course, an expert in his particular business. His job calls for knowledge of the working of hoisting machinery and involves practice in the synchronization of movements upwards or downwards with crosswise movements, and there would also be levers for regulating the speed of lowering, and possibly
- 55 also the speed of raising; but the matter of raising does not come into question in this particular case.

The *ratio decidendi* of the typical carriage case is that the hirer of a horse carriage, though having the absolute power to direct the time and destination of the drive he wants to take, has no control over the exercise by the driver of his art of driving. To my view those words precisely apply to the situation in this case. The watersiders on the wharf have the right to say whereabouts on the wharf the empty tray is to be landed. The whole process of getting it there and the speed and the course from the ship to the wharf is all left, and necessarily must be left, to the discretion of the crane-driver. He exercises all the art there is in the operation. It is therefore clear, to my mind, that the crane-driver in this case, whatever his position may have been in relation to bringing cargo out of the hold, is not the servant of, or under the dominion of, the waterside labourers who pack the butter-boxes on the tray. The fact that the matter of the relief of the four crane-men working at each hatch of the ship is done under the command of the foreman of the Harbour Board, in whose permanent employment the crane-men are, is to my mind a cogent argument that the crane-men are and remain the employees of the Harbour Board. They are changed from time to time at the will of the Board. That foreman has an office on the wharf, and he it is who arranges and directs the operation of relieving in turn each crane-man and putting another man in his place.

The accident to the plaintiff occurred when the crane-man was doing the act of lowering the tray in precisely the same way as it had been lowered every time it had been lowered through the night prior to the morning upon which the accident to the plaintiff occurred. It was left to the crane-man's discretion as to how he lowered the tray until it reached a point a few feet above the level of the wharf and in a position alongside a loaded tray waiting to be hoisted up. Then the watersiders would take hold of the tray and push it while so suspended, and until it was above the spot on the wharf where they wanted it to rest while being loaded by them.

If there was a duty on the watersiders on the wharf to give directions to the crane-man as to the method and speed of the lowering of the empty tray, then it was a breach of that duty on the watersiders' part that caused, or was a joint cause of, the accident.

The two witnesses for the plaintiff put the matter quite clearly. Haase says the driver could see the full tray quite easily and would land his empty tray in the vicinity of the full tray. The question was put to Haase that in ninety-nine cases out of one hundred the crane-driver, landed the tray without a word. The answer was :

They use their own discretion. They very often give a warning. It was not only dangerous to us or the tally clerk, but also to any one leaving the ship.

Haase says that no signal was given by the watersiders for the tray to come down on this occasion, and that when the tray comes down it stops some feet off the wharf, and it was on its way to that position on the day of the accident. It did that so that the watersiders could get hold of it and shift it into the position they wanted it. It was when the accident to the plaintiff occurred when the cry was given to the crane-man to stop the crane a few feet before it got to its normal stopping-point.

The mere fact that an empty tray would be immediately stopped by the crane-man if the watersiders called out for it to stop involves nothing more than that if any one—even a stranger—called out "Stop" the lowering by the crane-man would stop.

I cite the following two passages from the judgment of the Court of Appeal (*Scott, du Parcq*, and *Morton*, L.JJ.) in the two cases *Dowd v. W. H. Boase and Co., Ltd.*, *McFarlane v. Coggins and Griffiths (Liverpool), Ltd.* (1): "In our view, however, in each of the cases before
5 "us the regular employers have failed to establish that the hirers had
"such control of the acts of the workman, at the time of the accident,
"as to become liable as employers for his negligence"(2); and: "It
"is true that the crane-driver was acting under the immediate direc-
"tions of the hirers in the sense that they could tell him where to go
10 "and what to carry on his crane, but, as has already been pointed out,
"he was not under their directions in regard to the manner in which
"he should drive the crane, and it was the manner in which he drove
"the crane which caused the accident to the plaintiff. As a repre-
"sentative of the hirers said in his evidence: 'We naturally hang the
15 "'slings on and sling the stuff, but of course we leave it to the crane-
"driver to take it in his way. We do not interfere with the driver of
"the crane'"(3).

In my view the judgment of the Court below should stand and the appeal be dismissed with costs against the Harbour Board.

20 FAIR, J. This is an appeal in respect of an action for damages for injury suffered by the first respondent in the course of his employment as tally clerk during the loading of butter from the wharves at Wellington into the *Port Melbourne* on January 7, 1945. On the appeal neither
25 defendant questioned the finding of the jury that his injuries were suffered owing to the negligence of the crane-driver in the operation of the Wellington Harbour Board's crane, which was the substantial cause of such injuries.

Only two questions arise for consideration by this Court. First, whether the time, method, and manner in which the tray attached to
30 the hook of the crane for carrying butter-boxes from the wharf into the ship was lowered was under the control of the Port Line, Ltd., or its servant, at the time the accident occurred. If it was under the Port Line's control, the second question is whether, in law, both the defendants, or one only, and if so which, is legally liable for the damage that the plaintiff
35 suffered. It is common ground that the crane-man was, at all material times, the general servant of the Harbour Board; and that the crane and general care and management of the machinery of the crane, as contrasted with the operations being carried out by it, were under his control, and that of the Harbour Board by its servants. It is also common
40 ground that the Port Line and its servants control the time for starting and stopping the lift of the load attached to the crane. Whether it was entitled to, or did, exercise greater control than this over the carriage and placing of the loads by the crane is in issue, and requires to be decided as a question of fact by the Court. That question will be con-
45 sidered more fully later in this judgment.

It seems convenient first to consider the respective liabilities in law of the general employer of a servant who has been hired, together with the machine which he operates, to do work for another, and those of the hirer.

50 In the Supreme Court, and in this Court, both counsel for the appellant and counsel for the respondents undertook the examination of, and invited the Court to examine in detail, the long line of authorities dealing

(1) [1945] K.B. 301; [1945] 1 All E.R. 605. (2) *Ibid.*, 307; 608.

605.

(3) *Ibid.*, 308; 609.

with the question as to what was the criterion, or criteria, for deciding whether, while doing or omitting the acts relied upon as negligence causing the accident, a man in such a situation as that of the crane-man was acting as the servant of the hirer or of his general employer. But that task was undertaken by the Supreme Court of Canada in 1919, the Court of Appeal in England in 1943 and 1945, by this Court in 1939, by the Privy Council in 1921, and by the House of Lords in 1942. It would appear a work of supererogation for this Court again to embark on the same inquiry. In my view, we should refrain from doing so, and should accept without question the principles stated in those cases, particularly as they are expressed in terms that, with one exception, do not permit any suggestion of ambiguity.

This observation applies with special force to the question as to whether the general employer is liable for the negligent acts of a servant where the method and manner of his doing the act complained of was subject to the almost complete control of his temporary employer.

The decisions to which we refer are, in point of time, *Bain v. Central Vermont Railway Co.*(1), which considered the judgment of the Supreme Court of Canada(2), the decision of this Court in *Hunia v. Winstone, Ltd.*(3) affirming the decision of the Supreme Court(4), *Century Insurance Co., Ltd. v. Northern Ireland Transport Board*(5), and the decisions of the English Court of Appeal in *Dowd v. W. H. Boase and Co., Ltd.*(6), and *Nicholas v. F. J. Sparkes and Son*(7). The case last named was decided in 1943 by *Scott, Luxmoore, and Goddard, L.JJ.*, and was expressly adopted, and the same question considered and decided, in 1945 in *Dowd's case*(8) by *Scott, du Parc, and Morton, L.JJ.* In considering these decisions, and the others referred to in them, little assistance can be gained from comparing the facts of one case with the facts of another, for no two cases are identical in their facts, and an apparently slight difference may, upon a consideration of the whole of the circumstances, be of very material importance. The Court must seek for principles, and then itself determine their application to the facts before it. The observations of Lord Loreburn, L.C., in *M'Cartan v. Belfast Harbour Commissioners*(9) seem relevant on this question: "Decisions [said Lord Loreburn] are valuable for the purpose of ascertaining a rule of law. No doubt they are also useful as enabling us to see how eminent Judges regard facts and deal with them, and great numbers of recorded precedents are useful in no other way. But it is an endless and unprofitable task to compare the details of one case with the details of another, in order to establish that the conclusion from the evidence in the one must be adopted in the other also. Given the rule of law, the facts of each case must be independently considered, in order to see whether they bring it within the rule or not"(10).

Hunia's case(11), at the request of the counsel for the plaintiff, raised in a clear-cut form the question whether the general employer could be liable where a truck and the driver were subject to the directions and control of the temporary employer as to the place, manner, and method of performing the work in the course of the execution of which

(1) [1921] 2 A.C. 412.

(2) (1919) 48 D.L.R. 199; 58 S.C.R. 433.

(3) [1946] N.Z.L.R. 817n.

(4) [1939] G.L.R. 66.

(5) [1942] A.C. 509; [1942] 1 All E.R. 491.

(6) [1945] K.B. 301; [1945] 1 All E.R. 605.

(7) [1945] K.B. 309n.

(8) [1945] K.B. 301; [1945] 1 All E.R. 605.

(9) [1911] 2 I.R. 143.

(10) *Ibid.*, 145.

(11) [1946] N.Z.L.R. 817n.

the accident occurred. This question, and the earlier decisions, now presented in detail for examination by this Court (other than those in the Scottish Courts), were considered first in the Supreme Court. The principles there laid down were affirmed in the Court of Appeal, and were the same as those adopted in *Dowd's case*(12).

I shall, therefore, refer briefly only to the principles stated in the English Court of Appeal, and in the Privy Council and House of Lords cases referred to, as they seem to provide an amply sufficient statement of the test to be applied to the circumstances of this case.

10 In *Nicholas v. F. J. Sparkes and Son*(13) the Court said: "The power
 "of control of the new superior (the temporary employer) must be
 "present in connection with the doing of the particular act which proves
 "to be tortious and so gives the injured party a right of action. No
 "other control is relevant. That is the *ratio decidendi* of the carriage cases,
 15 "which held that the hirer, though having absolute power to direct
 "the time and place of the drive he wants to take, has no control over
 "the exercise by the driver of his art of driving. If he drives
 "negligently and injures some one, it is his regular employer who is
 "responsible and not the hirer of the carriage; because the hirer has
 20 "no right, as a term of his contract of hire, to interfere with the driver
 "in the exercise of his art. On the other hand, if the nature of the work,
 "for which A. lends the use of his vehicle, or ship, or moveable cranes
 "to B., necessitates the exercise of detailed control by B. over the manner
 "in which A.'s servant will have to do the work which A. has contracted
 25 "with B. that A.'s servant shall do for B. so that it becomes the servant's
 "duty (a) to comply with B.'s orders, or (b) not to act except on B.'s
 "orders then *pro hac vice*, for the purpose of responsibility in tort, B.
 "becomes the master of A.'s servant in the doing of that work. This
 "was the basis of the decision in *Donovan v. Laing* ([1893] 1 Q.B. 629)
 30 "and in *Bain v. Central Vermont Railway Co.* ([1921] 2 A.C. 412). In
 "the former, *Bowen, L.J.*, said (at 634) two things: (1) the employer
 "(for the purpose of the rule '*respondeat superior*') is 'the person who
 "has the right at the moment to control the doing of the act'—i.e.,
 "the act which causes the damage; and (2) the hirer of a carriage
 35 "with driver is not liable unless he 'actively interferes with the driving'—
 "i.e., in the exercise by the driver of his art. In *Bain's case* the cause
 "of the accident was the disregard by the servant of A., in driving A.'s
 "train over B.'s railway, of the signals on B.'s railway, obedience to
 "which by A.'s servant was implied by a vital term of the running-
 40 "power contract between A. and B. As the Privy Council said 'These
 "signals were the mechanical expression of the orders of the Grand
 "Trunk, orders which Frost [the servant of the Central Vermont
 "Railway Co.] at that moment was bound to obey,' and the Board
 "quoted the above sentence from *Bowen, L.J.'s*, judgment in *Donovan*
 45 "v. *Laing Syndicate* with approval"(14).

In *Bain's case*(15) the Privy Council, in referring to the judgment of the learned trial Judge, which was reversed on appeal, said: "Their
 "Lordships think that this is leaving out of view the point of time at
 "which the position must be determined. In the words of the judgment
 50 "reported by *Sirey* and quoted by *Brodeur, J.*, you are to look to the
 "'patron momentané qui avait ce préposé sous ses ordres et sur lequel
 "'il avait une autorité exclusive au moment de l'accident.' It is

(12) [1945] K.B. 301; [1945] 1 All E.R. 605. (14) *Ibid.*, 311n.

(13) [1945] K.B. 309n.

(15) [1921] 2 A.C. 412.

"nothing to the purpose that there may be at the same time a sort
 "of residuary and dormant control of the 'patron habituel' . . .
 "As a matter of fact so literally was the arrangement, embodied in clause
 "6 of the agreement already quoted, carried out that Frost signed a
 "separate receipt for the payments made to him by each company 5
 "respectively for his services while working on each line respectively.
 "Payment is not everything; it is a circumstance pointing to who is
 "the employer, *but the real test is control, and at the moment of the accident*
 "*the control of Frost was in the Grand Trunk*"(16). The italics are
 mine. 10

Lord Simon, L.C., in the *Century* case(17) adopts *Bowen, L.J.*'s, state-
 ment that the test was "in whose employment the man was at the time
 "the acts complained of were done, in this sense, that by the employer is
 "meant the person *who has a right at the moment to control the doing of*
 "*the act.*" This would appear plainly enough stated, but in *Hunia's* 15
 case(18) the argument led to the definition being construed as meaning
 by "control the doing of the act," "control the time, method, or manner
 "of doing the act where these constitute the tortious act," and this is,
 I think, plainly the sense in which the Lord Chancellor was using it(19).
Lords Romer and Porter concurred(20), without stating their reasons 20
 independently.

Lord Wright wrote a separate judgment(21), which considers in more
 detail the question as to when the measure of control amounts only to
 directions as to when and where the servant is to do the work he is 25
 lent to perform, and not to controlling *how* he is to do it. When his
 judgment, and the passage cited in it from *Cameron v. Nystrom*(22),
 are considered in relation to this question, it does not appear to modify
 or qualify the judgment of the Lord Chancellor or the principle stated
 in the judgments of the Privy Council and the Court of Appeal, but
 refers to directions as to the nature of the task to be performed—not to 30
 directions as to the time, method, or manner of performing it. The
 judgment of the Lord Chancellor of Northern Ireland in the *Century*
 case(23), referred to by Lord Wright, states the principle or criterion
 in almost identical terms, where he says: "They [the Transport Board]
 "no more controlled Davison in *the means or method* of delivery of the 35
 "petrol at the garage than they controlled him in his driving of the
 "lorry from Larne to Belfast. . . . He [the hirer's agent] could
 "have had no authority to give orders in regard to *the method of perform-*
 "*ing work* undertaken by the Board for reward to them . . . a
 "contract of carriage by independent contractors who may reasonably 40
 "be expected to accept orders as to the ends, but not as to the means,
 "the methods, or the manner of doing the work"(24).

With the greatest respect for the learned trial Judge's careful judg-
 ment, it appears to me that he has not, in determining the issue, taken
 the principle set out in *Bain's*(25), *Hunia's*(26) and *Boase's* cases(27) as 45
 the criterion to determine whose servant the crane-man was. It appears
 that he consequently misdirected himself in considering the question of
 fact.

(16) *Ibid.*, 416.

(17) [1942] A.C. 509, 513; [1942] 1 All
 E.R. 491, 494.

(18) [1946] N.Z.L.R. 817n.

(19) [1942] A.C. 509, 513; [1942] 1 All
 E.R. 491.

(20) *Ibid.*, 515, 520; 495, 498.

(21) *Ibid.*, 515, 516, 517; 495, 496.

(22) [1893] A.C. 308; N.Z.P.C.C. 436.

(23) [1941] N.I. 77.

(24) *Ibid.*, 87.

(25) [1921] 2 A.C. 412.

(26) [1946] N.Z.L.R. 817n.

(27) [1945] K.B. 301; [1945] 1 All E.R.
 605.

Before proceeding to consider the issue of fact I should, perhaps, refer to the submission by Mr. *Watson* that *Bowen*, L.J.'s, statement of principle in *Donovan's* case(28) might be considered as criticized by the fact that *Lord Dunedin* in *M'Cartan's* case(29) expressed a preference for the test used by *Bowen*, L.J., in *Moore v. Palmer*(30)—viz., "The great test was this—whether the servant was transferred or only the use and benefit of his work?"(31). But, as *Smith*, J., points out in his judgment in *Hunia's* case(32), in two later cases in which *Lord Dunedin* delivered the judgment of the Privy Council, *Societe Maritime Francaise v. Shanghai Dock and Engineering Co., Ltd.*(33) and *Bain's* case(34), *M'Cartan's* case(35) was neither cited in argument nor referred to in the judgments, and in each case His Lordship repeated the statement of *Bowen*, L.J., which he had criticized, and said that that statement expressed the law with accuracy. Moreover, in *A. H. Bull and Co. v. West African Shipping Agency and Lighterage Co.*(36) and the *Century* case(37) the Privy Council referred to *Donovan's* case for a clear exposition of the question as to whom responsibility attached for the act of a servant transferred, so to speak, for the convenience of working a chattel lent, or hired, to another.

Adverting now to a consideration of the facts, the Court approaches it on the basis of the statement in *Nicholas's* case(38) as follows: "It is important to remember that the burden of proof rests on the general employer to show affirmatively that his negligent servant was not acting within the limits of a proper discretion as such servant, but that in pursuance of the arrangement (whether amounting to a term of the contract or not) between his general employer and the other party, the servant was governing, or was bound to govern, his conduct by following the guidance of the other party. The employer cannot escape liability on a negative, he must give positive proof of the assumption of such responsibility by the other party"(39).

I turn now to consider the question as to under whose control the crane-man was as to the method, manner, and time at which he performed the particular act, or omitted the particular duty, which constituted the negligence which caused the accident. The breach of duty of which he was found guilty was failing to use due care while lowering on to the wharf the trays on which the butter-boxes were to be loaded.

The learned trial Judge has treated the question as to whose servant he is considered to be at the time of the accident as purely a question of law. No issue in respect of that was submitted to the jury, and this course was acquiesced in by all counsel. With the greatest respect, however, I think that the question is one almost entirely of fact. As *Lord Simon* says in the *Century* case(40): "In *M'Cartan v. Belfast Harbour Commissioners* this House emphatically stated that it is a question of fact how the maxim *respondeat superior* is to be applied in any particular case of this character"(41). The law is, I think, settled in the sense that I have endeavoured to state above. The question of fact is as to who at the time of the act, or omission, causing the accident, was controlling, or, if no control was actually exercised over

(28) [1893] 1 Q.B. 629, 632.

(29) [1911] 2 I.R. 143.

(30) (1886) 2 T.L.R. 781.

(31) *Ibid.*, 782.

(32) [1946] N.Z.L.R. 817n.

(33) (1921) 90 L.J.P.C. 851.

(34) [1921] 2 A.C. 412.

(35) [1946] N.Z.L.R. 817n.

(36) [1927] A.C. 686, 691.

(37) [1942] A.C. 509; [1942] 1 All E.R. 491.

(38) [1945] K.B. 309n.

(39) *Ibid.*, 312.

(40) [1942] A.C. 509; [1942] 1 All E.R. 491.

(41) *Ibid.*, 515, 495.

the servant at that moment, had the power of control over, his manner of doing such act. This being a question of fact not covered by the issues, and there having been no agreement on the subject between counsel, the presiding Judge had power to decide this question: *Brett v. Schneideman Bros., Ltd.* (42). The Court of Appeal has, of course, 5 the same power—Court of Appeal Rules, R. 5: *Murdoch v. British Israel World Federation (New Zealand) Inc.* (43).

The control exercised by the stevedores, the hatch-man, and the waterside workers loading the butter-boxes on to the trays was the subject of a considerable amount of evidence. The crane-driver himself 10 said :

While coming out of the ship I was under the direction of the ship's hatch-man. . . . When I was about 15 ft. up [from the wharf] *I went slowly to watch the watersiders.* Connor [a watersider loading] yelled out "Look out." Of course I do that without any signal. *They generally say "Hold it up there" by signalling with their hand.* If I don't get a signal I hold the tray in a position where they can handle it. 15

Question : And in no case did you receive a signal that all was clear ? Answer : Yes.

Question : On this occasion you came down without any signal ? Answer : 20 Yes. . . . I come down and wait for the wharfies to put the tray in position. I do that without any signal. *They generally say "Hold it up there" by signalling with their hand.* If I don't get a signal I hold the tray in a position where they can handle it.

Alexander Nicholson, the stevedore in charge of the loading operations 25 (and who is, in law, the servant of, and was called for, the Port Line), in cross-examination by Mr. Stevenson, said :

The crane-driver when he gets over the wharf would obey any signals from the men loading on the wharf. Actually the crane-driver watches the watersiders for any signals they may give. 30

Question : The crane-driver is subject to the signals of the hatchman while over the ship and is subject to the signals of the watersiders when his crane is over the wharf ? Answer : Yes. . . . The crane-driver knows there are two men working that tray and he looks for them to guide him where he is going.

In cross-examination by the plaintiff's counsel, he said : 35

Question : From the time the tray is above the top of the truck the crane-driver is subject to the signals of the men ? Answer : Correct.

Question : And should not lower his tray until they signal to him ? Answer : 40 Yes.

Thomas Blumen, the assistant traffic manager of the Harbour Board, 45 said :

If the ship requires a crane they would give us an order to that effect, and we will see that cranes are placed in position in accordance with their request. From then on the crane and the driver are entirely working under the jurisdiction of the shipping company. *If the driver is employed by the ship we have nothing to do at all with the working of that freight.* When the crane-driver starts to work he is under the orders of the stevedore of the ship. . . . From my experience the men working on the wharf usually signal the crane. 50

Question : He should not lower his tray into a position he can't see without some instruction from the men on the wharf ? Answer : Yes. 55

Question : That is just a matter of common sense ? Answer : Yes.

Question : But if the operations had been conducted in a way that required him to lower down into position where he could not see there should be a signal-man or something to give him instructions ? Answer : *As a rule the men on the wharf did that.* 55

Question : Some one on the wharf instructs him ? Answer : Yes.

Question : Finally if he has not got any instructions he shouldn't lower into any position any time he can't see that position ? *Answer* : No ; he should just lower it as far as he could see. That is if there is no one to direct him.

Question : He should then await directions ? *Answer* : Yes.

5 The plaintiff says :

Question : When he [the crane-man] is bringing the empty ones [trays] down he puts it into a position as near as he can to where the watersiders want it ? *Answer* : Yes.

10 *Question* : He will bring it down to the right or the left as they indicate to him ? *Answer* : Yes. . . .

Question : The crane-driver obeys the signals of the hatchman when going in the hold and the signals of any watersider when landing a tray on the wharf ? *Answer* : Yes.

Haase, a waterside worker, says :

15 The watersiders themselves do the signalling . . . as a rule we watersiders direct the crane-driver where to land it. . . . I would not hold it as a right to signal him where to land the tray. We did signal him. . . . If they are working in a narrow space I have heard the crane-drivers give a warning.

20 *Question* : In the great majority of cases, ninety-nine times out of a hundred, the crane-drivers land without a word ? *Answer* : They use their own discretion. They very often give a warning. . . .

Question : Was any signal given by any of your gang for the crane-driver to come down on this particular occasion ? *Answer* : None whatever.

Nicholson, who, as stevedore, was a responsible officer of the shipping
25 company in charge of the loading operations, and Blumen, the assistant traffic manager of the Harbour Board, agree that control over the crane-man as to time and manner of carrying out the loading operations was exercised wholly by the watersiders, who, so far as these were concerned, were entitled to issue orders to him. What clearer or better evidence
30 of what the arrangement in respect of the crane-man was could have been obtained I find it difficult to conceive. No doubt it was never put into express terms, either oral or written. But this is common and reasonable enough in commercial contracts of this nature. A practice no doubt has grown up and the understanding of it by two officers
35 holding responsible positions for the respective parties is weighty evidence as to its nature and terms that should not, I think, be rejected except for grave reasons. None such appears to exist. On the contrary, their evidence is confirmed by that of all the other witnesses including the crane-man, and has the additional corroboration of concurring with
40 what would appear the most reasonable and practical method of working.

With the greatest respect for the opinions of the other members of the Court, it seems to me clear that the watersiders (who were the employees of the shipping company), had the power to stop a load in mid-air, and to regulate its movements, and, from the general nature
45 of the control exercised by them, that the only fair inference is that the Harbour Board had parted with the general power of controlling the crane-man when working the crane with either a full or an empty tray attached to it. The only matters in the discretion of the crane-man himself (other than those left to him by the stevedore and his men)
50 would be obedience to orders likely to cause unwarranted damage to the structure or the machinery of the crane.

It was submitted by Mr. *Watson* that the allegations in the statement of claim did not extend to such a cause of action. There is some force in this contention. This defence does not seem to be clearly set up.
55 But it was relied on throughout the trial and argued at length in the motions for judgment. In such circumstances it is too late now to

object to its consideration by this Court. If the objection had been raised during the hearing in the Court below, or on the argument of the motions, it might have been met by amendment, or adjournment. The plaintiff is entitled, in such circumstances, to succeed *secundum probata non allegata* and, if necessary, an amendment of the statement of claim could, and can, be made. But it is not necessary, I think, that a formal amendment should be made. 5

The crane-man being, at this time, the servant of the Port Line, it appears to me that it is liable for the negligence which caused this accident, that the Harbour Board is not liable, and that the appeal 10 should be allowed, and judgment entered in the Supreme Court against the Port Line.

Having come to this conclusion, it appears unnecessary for me to determine the other grounds submitted by Mr. *Stevenson* in support of the appeal. 15

CORNISH, J. The proceedings which gave rise to this appeal began with one defendant, the Wellington Harbour Board, against which the plaintiff claimed damages on account of the alleged negligence of a crane-man in its general employ. But the Board having pleaded that if negligence were proved the party answerable for it was the respondent 20 Port Line, Ltd., the plaintiff prudently added the latter as a defendant.

At the trial, each defendant endeavoured to show that, if the crane-man had been negligent, he had been so as servant of the other. On the Harbour Board, as general employer, the burden of proof lay the more heavily. It had to prove affirmatively that, at the time of the 25 accident, its crane-man had been transferred from its service to the temporary service either of the ship-owner or of the stevedore. Either would do, because if the crane-man at the critical moment was the servant of the stevedore (the Waterfront Control Commission), then (by virtue of certain regulations) the ship-owner would be answerable 30 for his negligence.

Whether—at the end of the trial—the Board had, or had not, succeeded in proving a transfer of service to the ship-owner or the stevedore was a mixed question of law and fact. On it, an issue could have been asked for. But, as it was not, the question fell to be answered by the 35 trial Judge, who found, in effect, that the Board had not discharged the burden resting on it and was, therefore, liable for the crane-man's negligence.

The task that the Board had set itself was not an easy one. " . . . the burden of proof lying upon the regular employers is 40 " particularly difficult to discharge in cases where the workman who " caused the accident was driving a vehicle belonging to them, of which " he was in sole charge, and which he alone was allowed to drive on the " day of the accident. In such a case the vehicle has been placed under " the control of the driver by his regular employers who rely upon him 45 " to use his own skill and exercise his own discretion in driving it. This " being so, if he causes an accident by negligent driving it is not easy " to establish that some one else was his superior at the time of the " accident": judgment of the Court of Appeal in *Dowd v. W. H. Boase and Co., Ltd.*(1). In the present case, of course, it was a fixed crane 50 that was being operated, and not a vehicle that was being driven, by the

(1) [1945] K.B. 301, 306; [1945] 1 All E.R. 605, 608.

servant found to be negligent, but that circumstance does not render the foregoing observations inapplicable(2).

The Harbour Board hires its cranes (with drivers) pursuant to 188 of its By-laws and Regulations. This regulation provides, *inter alia*,—

- 5 (a) That the Board shall not be responsible for any loss or damage to the hirer or any person whatsoever arising out of the working of the crane—unless caused by the negligence of the Board or its servants.
- 10 (b) That the hirer shall conform to any reasonable order or condition in regard to the working or stoppage of the work of the crane which may, from time to time, be given or enforced by an official of the Board in the course of his duty.

On the hiring of a crane, the procedure followed by the Board and the applicant is very simple. No written or other express contract is entered
15 into. "If a ship requires a crane they order it by 'phone or by an application, and we supply the driver. If the ship requires a crane they would give us an order to that effect and we will see that cranes are placed in position in accordance with their request. From then on the crane and the driver are entirely working under the jurisdiction of
20 the shipping company": Mr. Blumen, assistant traffic manager of the Harbour Board.

In *Nicholas v. F. J. Sparkes and Son*(3) the Court of Appeal said: "The relevant maxim of *respondeat superior* may well, historically,
25 "have arisen out of the frequently recurring financial impossibility of getting money satisfaction in damages out of the individual person who committed the wrongful act. Where he was the general servant of an employer who could pay, and especially when the employer was getting profit or other advantage through his servant and through
30 "the operation in the doing of which the servant did the wrongful act, *respondeat superior* was a maxim of natural justice. But where his servant was put by him in the position of being under a duty to him to obey the particular command of a third person, and the command of that person was the direct cause of the wrongful act, then, obviously, justice would require that the injured third person should
35 "be able to treat the person giving the dangerous command as the workman's superior. This analysis of what may be the historical and certainly seems to be the logical genesis of the doctrine applied in the *Donovan v. Laing* ([1893] 1 Q.B. 629) type of case, helps, as a pointer, to one limitation which affects the application of the
40 "principle. *The power of control of the new superior must be present in connection with the doing of the particular act which proves to be tortious and so gives the injured party a right of action. No other control is relevant*"(4).

In the present case, the particular act (or acts) of the crane-man
45 which proved to be tortious was one (or more) of the following:—

- (a) Lowering the tray at a speed that was excessive in the circumstances;
- (b) Lowering the tray without giving a signal to the men below of his intention to do so; or
- 50 (c) Lowering the tray without getting a signal from the men below that it was safe to do so, such signal being necessary because the crane-man could not see who was, or might be, beneath the tray; or
- (d) Lowering the tray too close to the platform of the crane.

(2) [1945] K.B. 301, 311, 312; [1945] (3) [1945] K.B. 309n.
1 All E.R. 605, 608. (4) *Ibid.*, 310n., 311n.

Now, it was not any command of the ship-owner or stevedore that was "the direct cause" of the crane-man's doing any or all of the foregoing. His tortious act followed no order either to lower, or not to lower, the tray as he did. (There was, it is true, evidence of a warning shout that came too late to be effective. There was also evidence of a complaint as to speed having been made at an earlier stage of the operations, but none of any immediately before the accident. There was no evidence that the speed of the lowering operation had ever been prescribed or regulated by any of the stevedore's men. Each of these matters will be discussed later.)

But the Harbour Board says: "The circumstance that the stevedore (by its servants, the watersiders working on the wharf) had, in fact, given the crane-man no signal before the accident occurred is not material. What is material, and is alone material, is that the stevedore had then a *right* to give the crane-man an order or orders in connection with the act that proved to be tortious, which order or orders, if given, could have prevented the accident. It was by virtue of this right that the stevedore became the *superior*, for the time being, of the crane-man."

There was no proof of the creation of any such right by contract made between the parties before the crane began to be worked. It is, therefore, necessary, to ascertain what specific acts of the crane-man were done in response to orders or directions given to him by the stevedore (or its servants) while the crane was being worked. It may be that these will be seen to be consistent only with the existence of the right alleged.

Mr. Blumen, assistant traffic manager of the Harbour Board, said, in examination-in-chief, that after a crane was placed in position and work was started, "From then on the crane and the driver are entirely working under the jurisdiction of the shipping company." But this general statement begs the question. What it was necessary for Judge and jury to know was, what orders were, in fact, given by the stevedore to the crane-man, when they were given, and for what purpose they were given. Judge and jury would then be in a position to determine the extent of the "jurisdiction" (if any) referred to. But Mr. Blumen stated also in examination-in-chief:

If the driver is employed by the ship [by this he means "When a crane (with driver) is hired by a ship"] we have nothing at all to do with the working of that freight. When the crane-driver starts to work, he is under the orders of the stevedore of the ship. . . . From my experience the men working on the wharf usually signal the crane. The men on the ship have no jurisdiction over the men on the wharf at all. . . . We never have a signalman at any time directing any crane-driver. . . . The loading and unloading is definitely left to the shipping company. . . . In my experience of a driver, I have never known them [him?] to give a signal that he is coming down. It is just part of the work for him to go up and down.

Now, though Mr. Blumen says that the crane-driver is "under the orders of the stevedore of the ship," he does not indicate what these orders are. And when he says that "the men working on the wharf usually signal the crane," he does not state when, or why, they do so. But some information on these matters is got from Mr. Blumen's cross-examination by counsel for the plaintiff.

Question: You say you instruct your driver to obey the signals of the hatchmen when the driver can't see? *Answer:* Yes.

Question: The Board would not approve of a crane-driver lowering the crane-hook into the hatch unless he works under the direction of the hatchman? *Answer:* Yes.

Question : The reason being that he can't see what he is doing and might land on the head of some one in the hatch ? *Answer* : Yes.

5 *Question* : Now then, you would say, I suppose, landing and taking off from the wharf . . . the assumption is the crane-driver will be able to see for himself ? *Answer* : Yes.

Question : And therefore he should not lower his tray into a position he cannot see without any instruction from the man on the wharf ? *Answer* : Yes.

Question : That is just a matter of common sense ? *Answer* : Yes.

10 *Question* : But if the operations had been conducted in a way that required him to lower down into position where he could not see there should be a signal-man or something to give him instructions ? *Answer* : As a rule the men on the wharf did that.

Question : Some one on the wharf instructs him ? *Answer* : Yes.

15 *Question* : Finally if he has not got any instructions he shouldn't lower into any position any time he can't see that position ? *Answer* : No ; he should just lower it as far as he could see. That is if there is no one to direct him.

Question : He should then await directions ? *Answer* : Yes.

These answers tell us the purpose of at least some of the signals that were given to the crane-man by the men on the wharf. That
20 purpose was to assure him that he could safely continue to lower his tray towards the wharf at times when he himself could not see who was, or might come, beneath the tray. In other words, some of the signals given to the crane-man by the men on the wharf were intimations that it was safe for him to do what his own judgment would prevent him
25 from doing unless he received such intimations. If such signals were among the "orders" of which Mr. Blumen speaks in his examination-in-chief, and if the crane-man was bound to obey them when given, they have no importance in the present case. The plaintiff was injured, not because the crane-man acted in reliance on any signal to go on lower-
30 ing when he himself could not see where the tray was going, but because he went on lowering into a blind spot without any safety signal having been given to him. And, even if it was the duty of the men on the wharf to give the crane-man a signal when it was safe for him to go on, the occasion for the giving of one did not arise. Therefore, signals of
35 the kind specifically described by Mr. Blumen do not establish any right of control by the stevedore that is relevant to the present inquiry.

It may be said, however, that there is another inference that may be drawn from the answers given by Mr. Blumen in cross-examination. It was suggested to him that, if the operations of loading had been
40 conducted in such a way that the crane-man was required to lower into a position where he could not see, there ought to be a signal-man on the wharf to direct his movements. Mr. Blumen's comment on that was, "As a rule the men on the wharf did that." In other words, if necessity arising from the nature of the operations requires the crane-
45 man to lower blindly, the men on the wharf "as a rule" watch over him, signalling when it is unsafe for him to proceed. The inference that it may be sought to draw from this evidence is that, on occasions, the stevedore's men assume the responsibility of guiding the crane-man ; that he is aware of this, accepts the situation and puts himself, as it
50 were, in their hands. In other words, in order that the work may be carried out as quickly as possible, it is agreed that the crane-man shall lower his tray blindly unless he gets a warning signal which will be given to him if danger threatens. But the finding of the jury that the crane-man was negligent is against the drawing of such an inference. The
55 crane-man could not have been negligent if he was entitled to assume that he would get a signal to stop if there was danger. Therefore, as

he was negligent, he could not have been entitled to make this assumption. If he was not so entitled, it was because the stevedore's men had not undertaken to give him such a signal, and there was no agreement that he should be under their control. Therefore, he had been left to exercise the discretion vested in him, as a skilled and presumably careful man, by his employer.

There were, however, other occasions on which the men on the wharf did give the crane-man signals which were connected with the lowering of the tray, and with which he complied. Typical evidence on this point is given by Haase, a waterside worker employed by the stevedore, and Nicholson, a foreman in the employ of the stevedore.

Haase, in cross-examination by counsel for the Harbour Board, said :

As a rule we watersiders direct the crane-driver where to land it [an empty tray]. We get it to land as near as possible to the work—I would not hold it as a right to signal him where to land the tray. We did signal him. I know that the crane-driver lands the tray where the crane hatch-man directs him to land it.

Question : In the great majority of cases, ninety-nine times out of a hundred, the crane-drivers land without a word? *Answer :* They use their own discretion. They very often give a warning.

Alexander Nicholson, stevedore's foreman in charge of the loading operations (called for respondent Port Line, Ltd.) stated, again in cross-examination by counsel for the Harbour Board :

Question : The crane-driver when he gets over the wharf would obey any signals from the men loading on the wharf? [This appears to be a question though there is no mark of interrogation in the printed case.] *Answer :* Actually the crane-driver watches the watersiders for any signal they may give.

Question : The crane-driver . . . is subject to the signals of the watersiders when his crane is over the wharf? *Answer :* Yes.

Question : It has been long suggested that the Harbour Board should have another signaller on the wharf for the crane, is that reasonable? *Answer :* I have been for a number of years down there and I have never heard of it. The crane-driver knows there are two men working that tray and he looks for them to guide him where he is going.

From these statements of Haase and Nicholson no more is necessarily to be inferred than this, that if the watersiders gave the crane-man a signal to lower the tray to an indicated position, he would act as directed. But it is not proved that the purpose of such signals was other than to serve the convenience of the men below and to facilitate their handling of the empty trays. It is not shown that they were given to avert danger, or were given except on occasions when the crane-man was able (as far as is known) to see for himself who was, or might come, beneath the tray. It is not proved that the watersiders ever gave the crane-man a signal to hold the tray in mid-air because they could see, what he could not, that it was unsafe to proceed further.

Some of the statements assented to in cross-examination by several of the witnesses are wide enough to show control by the stevedore over all phases of the crane-man's operations, whether hazardous or not, and whether their purpose was safety or convenience. Thus, the plaintiff says in cross-examination by counsel for the Harbour Board :

Question : The crane-driver obeys . . . the signals of any watersider when landing a tray on the wharf? *Answer :* Yes.

Is it not an arbitrary and unreasonable restriction of the meaning of language to infer from such statements as these anything less than control by the stevedore, at all stages, of the crane-man's operations of lowering and lifting the trays? I do not think so. The Harbour

Board had to discharge a burden of proof which is, admittedly, not a light one. It had to show that the present case differs from the majority of cases in which a vehicle or other instrument is hired with its service.

- “Most cases,” said *Lord Wright* in *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board*(5), “can be explained on the basis of there being an understanding that the man is to obey the directions of the person with whom the employer has a contract, so far as is necessary or convenient for the purpose of carrying out the contract. Where that is the position, the man who receives directions from the other person does not receive them as a servant of that person, but receives them as servant of his employer.”

- Being under the necessity of proving that this was the exceptional case, to be explained on some understanding other than that described by *Lord Wright*, the Harbour Board had to adduce evidence consistent only with the stevedore's having acquired a power of control over a class or series of hazardous acts, one of which proved to be tortious. “No other control is relevant”: *Nicholas v. F. J. Sparkes and Son*(6). Proof of control over a class or series of non-hazardous acts none of which proved to be tortious was insufficient for this purpose.

- It would seem that, when lowering the tray, the crane-man kept the movements of the men below under observation. Speaking of what he did just before the accident, he says: “When I was about 15 ft. up [above the wharf] I went slowly to watch the watersiders.” Presumably, this was to see what they were doing and where they might be going. It may have been to see where they wished the tray to be placed. It is possible that it may have been to see whether a warning signal would be given; but this is improbable as the crane-man had not received any such signal during the whole of the operations. But, whatever be the explanation of his watching the watersiders, the fact is that he continued to lower his tray without knowing who was beneath it, or might come (from under the crane, at any rate) beneath it. And he had been acting in this way throughout the operations.

- Question*: You had been carrying on like that all the evening, landing trays when you could not see? *Answer*: Yes. When I could not see underneath the tray.

Question: And in no case did you receive a signal that all was clear? *Answer*: Yes. [I understand this answer as meaning “No.”]

Question: On this occasion you came down without any signal? *Answer*: Yes.

- That this was a dangerous practice for the crane-man to adopt is proved by the accident, for, after getting a warning of sorts, he at once tried to arrest the descent of the tray. But the warning had come too late. The question, therefore, arises, “Who authorized this dangerous practice?” It was certainly not the Harbour Board. The cross-examination of Mr. Blumen makes it clear that the Board expected the crane-man not to go on lowering when he could not see, unless he received a signal to go on. Was it then the stevedore that authorized it? Did it (by its servants, the men on the wharf) undertake the responsibility of ensuring that the crane-man would not continue his lowering operations past the point of safety? Did it stand guard over him, ready to restrain him in good time from the continuing of his lowering operation when this threatened danger? There is no evidence that it did. One chance cry uttered when the accident was imminent can hardly be

(5) [1942] A.C. 509, 517; [1942] 1 All E.R. 491, 496, 497. (6) [1945] K.B. 309n., 311n.

regarded as adequate evidence of the assumption of such responsibility by the stevedore. During the whole of the time that the work of loading had been going on, the crane-man had been doing the very thing that in the end caused the accident—coming down too far without any signal from the stevedore's men.

An element of the tortious act may have been excessive speed. As already stated, there was evidence that one of the stevedore's men had remonstrated with the crane-man at an earlier stage of the operations as to the speed at which he was lowering the trays. Haase (a watersider), who was called as a witness for the plaintiff, was asked in examination-in-chief:

Did you have any cause for complaint in the way the trays had been landed?

He replied:

Early in the morning, my mate called out to the crane-driver asking him to come down slower. That was previous to the accident. He said: "You will injure somebody if you don't come down slower."

On this question of speed, Byrmand (a waterside worker) who was called for the plaintiff said in examination-in-chief:

I should say the tray came down fairly fast. Some cranes are faster than others. It depends. . . . I should say it was fast any way.

Nicholson (stevedore's foreman), called as a witness for the ship-owner, was asked in examination-in-chief:

Have you as a foreman stevedore any right to control the manner in which he operates or drives his crane?

His answer was:

Those cranes go at a given speed more or less. They have a standard speed. They probably go faster coming back with a full load than going up with one. I would not be sure of that.

Pirie (chief mechanical engineer of the Harbour Board), called for the Harbour Board, said:

This particular crane is at No. 3 position, Glasgow Wharf. The maximum lowering speed is 300 ft. per second.

(It was agreed by counsel that this was a misprint: and that what the witness had said was "300 ft. per minute.")

Now, assuming that this evidence establishes that, on the occasion of the accident, the crane-man lowered the tray too fast, and that his doing so contributed to the accident, it does not prove that the control of speed had been specifically withdrawn from the discretion of the crane-man and transferred to that of the stevedore. That, of course, would not matter if the crane-man were otherwise proved to have had no discretion, but to have acted wholly under the control of the stevedore in carrying out his operations of lowering and raising the trays. In that case, evidence of excessive speed would not be needed to establish the Harbour Board's case.

Control of the crane-man's operations is not, in my opinion, proved by statements that, "if the driver is employed by the ship, we have "nothing at all to do with the working of that freight"; "the loading "and unloading is definitely left to the shipping company." Such "evidence as that is not enough. "The employer cannot escape liability on a negative, he must give positive proof of the assumption "of . . . responsibility by the other party"(7).

The Harbour Board's case really comes to this: that, if warning signals had been given to him, the crane-man would have been bound to

obey them. In prudence, no doubt, he would. To have ignored them would have been an aggravated breach of a general duty to be careful. Going down blind would in itself be careless. Doing so in defiance of a warning would be still more careless. But this aspect of the matter is of no importance as the accident was not due to defiance of any warning.

It may be that the stevedore's servants ought to have seen at an earlier stage of the operations that the crane-man was lowering the tray without due regard to possible consequences; and that they ought then to have insisted on controlling the operation of lowering it. But the circumstance that they might have been able to assume control, had they insisted on doing so, is not enough. The fact is that they never did assume control; and there is no evidence that, either before or after the operations began, they ever established the right to do so.

It may, however, be that the stevedore had a general or comprehensive power of control over the crane-man, from which a power of control over the doing of the tortious act is to be inferred. If so, it was a right that was limited in both nature and extent. "If you are dissatisfied with the manner in which a crane-driver operates his crane, to whom do you go about that?" To this question, Alexander Nicholson, a servant of the stevedore, answered: "To the foreman in charge of the Board." Only the Harbour Board could dismiss him, or take him off the job and replace him by another crane-man. The Harbour Board arranged when he was to be relieved by another of its servants. The Harbour Board could give, and enforce at any time, any reasonable order, or make and enforce any reasonable condition in regard to the working or stoppage of the crane: Reg. 188. The most that either ship-owner or stevedore could do was to give him signals when to start and when to stop the hoisting of full trays from truck to ship, and the lowering of empty ones from ship to truck.

In *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board*(8), Lord Wright said: "In his judgment in *Moore v. Palmer* (2 T.L.R. 781, 782), Bowen, L.J., stated a more concise criterion that 'the great test was this, whether the servant was transferred, or only the use and benefit of his work?' Control is not here taken as the test. There are many transactions and relationships in which a person's servant is controlled by another person in the sense that he is required to obey the latter's instructions. Such was the case of *Quarman v. Burnett* (6 M. & W. 499), the authority of which has never been questioned." And again "In *M'Cartan's* case ([1911] 2 I.R. 143) the use and benefit of the harbour company's crane and its driver were transferred. The driver, of necessity, had to obey the directions as to lowering and hoisting given by those conducting the operation, but it was held that there was no transfer of employment"(9).

Neither ship-owner nor stevedore had any part in the selection of the crane-man. This was the affair of the Harbour Board alone. With its crane, it sent a man who was experienced in the working of it. He knew without help or orders from any one how to perform the operations of raising, lowering, and swinging round the jib of the crane. At times, no doubt, he needed some assistance or guidance when he could not see what was beneath his hook and tray. Then, in prudence, he ought not to have gone on with his work until that assistance or guidance in the form of an assurance that all was clear was forthcoming. But

(8) [1942] A.C. 509; [1942] 1 All E.R. (9) *Ibid.*, 516, 517; 496.

his getting, if in fact he did get, the watersiders' assistance at those times did not make him their fellow-servant. He and they worked together, each aiding and supplementing the other's efforts. But co-ordination of effort does not necessarily import subordination to a common master. *Johnston, J.*, thought that the signals received and acted upon by the crane-man were "directions," in the sense that they were not orders or commands issuing from a new superior, but were merely aids to effective and convenient working which the crane-man expected to get and of which he availed himself in the course of serving his employer, the Harbour Board. In my opinion, the evidence is consistent with such a view, which, on similar facts, was that also of the Lord Justice-Clerk in *Cairns v. Clyde Navigation Trustees*(10). "Then again he—*i.e.*, the crane-man—might to some extent be under the control and subject to what may be called 'orders' if the load was out of his sight at the particular time—that is to say, down in the hold—when the chain or rope was going up or down. In such circumstances he would require the assistance of some one in doing his work to guide him when to raise and when to lower. But these things do not appear to me to indicate that he was subject to the orders of any one but his own master"(11).

In *M'Cartan v. Belfast Harbour Commissioners*(12), the hirer's servant directed the crane-man when to raise and when to lower buckets that were being used in discharging a vessel. The accident was caused neither by obedience nor by disobedience to any such direction. In the present case, it is alleged that there was the additional right in the ship-owner or stevedore to give a signal when the crane-man should temporarily cease the lowering of the tray. Here, again, the accident was caused neither by obedience nor by disobedience to any such signal. I cannot see any real difference between *M'Cartan's* case and this.

The present case is different from that of *Hunia v. Winstone, Ltd.*(13), a decision of our Court of Appeal. In that case, *Ostler, J.*, referred to the absolute control over not only the place but the manner and method of unloading which the jury found was exercised by the Texas Oil Co. over Haynes at the time when that accident occurred(14). And *Smith, J.*, said: "In my opinion, the present case is distinguishable from *M'Cartan's* case . . . in that there was here uncontradicted evidence of an antecedent arrangement that Haynes would obey the Texas Co. in that company's work of unloading in their yard the respondent's lorry, that he did so obey, and that thereafter they asked for him to be sent to them"(15).

The present case is also different in essentials from *Bain v. Central Vermont Railway Co.*(16). There the Grand Trunk Railway, which was held to have become the "patron momentané" of the negligent engineer, had exclusive authority over him at the moment of the accident. He was then in its pay, and driving an engine on its line. He was liable to be dismissed and was, in fact, dismissed by it for misconduct while on that line. In circumstances such as those, he was, of course, bound to obey its signals. *Bain's* case falls into the same category as *Donovan v. Laing, Wharton, and Down Construction Syndicate, Ltd.*(17), in which the crane-man "was bound to work the crane according to the orders

(10) (1898) 25 R. (Ct. of Sess.) 1021.

(11) *Ibid.*, 1027.

(12) [1911] 2 I.R. 143.

(13) [1946] N.Z.L.R. 817*n*.

(14) *Ibid.*, 821.

(15) *Ibid.*, 823.

(16) [1921] 2 A.C. 412, 416.

(17) [1893] 1 Q.B. 629.

"and under the entire and absolute control of the hirers": per *Lord Esher*, M.R.(18). In my opinion, the evidence in the present case falls short of establishing such control.

The case of *A. H. Bull and Co. v. West African Shipping Agency and Lighterage Co.*(19) is also distinguishable. There, the Privy Council said: "The sense, as well as the law of the position, is that during the entire period of hiring the barge had to be watched over by the bailee, and it was the bailee's duty to keep an eye upon the labourers or to furnish others so that the chattel might not be lost"(20). In the present case, in my opinion, neither in sense nor in law was it the duty of the ship-owner or the stevedore to "keep an eye" on the crane-man to see that he did not act negligently. Both were entitled to assume that orders were not required to restrain him from dropping heavy wooden trays in a place where men were working without some reasonable assurance that they would not strike any one.

In a recent English decision, *Nicholas v. F. J. Sparkes and Son*(21), the Court of Appeal said: "One test in cases of a vehicle or other instrument lent with its services to a hirer is this question: 'In the doing of the negligent act was the workman exercising the direction given to him by the general employer or was he obeying (or discharging) a specific order of the party for whom, upon his employer's direction, he was using the vehicle or other instrument?'"(22). This test was later approved and applied in England again by the Court of Appeal, in *Dowd v. W. H. Boase and Co., Ltd.*(23). If that test is applied to the facts of the present case, the same result must follow. In doing the act that proved to be tortious the crane-man was not obeying (nor was he disobeying) any specific order of the ship-owner or stevedore. As an experienced crane-man, he had vested in him by his general employer a discretion to determine how far he could safely lower an empty tray towards the wharf when he could not be sure that some one might not come beneath it. In the faulty exercise of that discretion, he lowered it too far, and perhaps too fast, and this was the cause of the accident.

In my opinion, *Johnston, J.*, was right and the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Izard, Weston, Stevenson, and Co.* (Wellington).

Solicitors for the first-named respondent: *Mazengarb, Hay, and Macalister* (Wellington).

Solicitors for the second-named respondent: *Chapman, Tripp, Watson, James, and Co.* (Wellington).

(18) [1893] 1 Q.B. 629, 632.

(19) [1927] A.C. 686.

(20) *Ibid.*, 690.

(21) [1945] K.B. 309n.

(22) *Ibid.*, 311n., 312n.

(23) [1945] K.B. 301, 307; [1945] 1 All E.R. 605, 608.

[IN THE MAGISTRATES' COURT.]

DAY v. JUNK.

1946. August 13, 20, before Mr. J. MILLER, S.M., at Hastings.

Motor-vehicles—License—Member of Armed Forces with License under Regulations since revoked—License in force—Whether limited to driving of Army Vehicle—“Such license”—“Termination of the present war”—Motor-vehicles Emergency Regulations, 1940 (Serial No. 1940/256, 1942/185), Reg. 3 Amendment No. 1 (Serial No. 1942/185), Reg. 2—Motor-drivers Regulations, 1940 (Serial No. 1940/73), Reg. 2.

J., who was a member of the Armed Forces, held a motor-driver's license, issued in pursuance of Reg. 3 of the Motor-vehicles Emergency Regulations, 1940, which license, unless revoked, was to remain in force “until the first complete month after the termination of the present war.” On May 4, 1946, he was driving a motor-car, privately owned, for his personal use. He was charged with a breach of s. 20 of the Motor-vehicles Act, 1924, in that he drove the motor-car without a motor-driver's license.

Held, dismissing the information, 1. That, notwithstanding the revocation of the Motor-vehicles Emergency Regulations, 1940, the license issued to the defendant was still in force, as the termination of the war had not yet occurred.

2. That there was no authority under the Motor-vehicles Act, 1924, to issue more than one license to the same person; and the license held by the defendant covered both Army and privately-owned motor-cars.

INFORMATION charging the defendant that he did on May 4, 1946, drive a motor-vehicle, without being the holder of a motor-driver's license, contrary to s. 20 of the Motor-vehicles Act, 1924.

Senior Sergeant Quayle, for the informant.

Gifford, for the defendant.

Cur. adv. vult.

MILLER, S.M. The defendant, who is a member of the Armed Forces, was issued with a motor-driver's license in pursuance of the Motor-vehicles Emergency Regulations, 1940, Amendment No. 1 (Serial No. 1942/185). These regulations have since been revoked, but the license is still in force: see the Acts Interpretation Act, 1924, s. 20 (e).

The regulation in question provides as follows:—

“Notwithstanding anything to the contrary in the Motor-vehicles Act, 1924, or in the Motor-drivers Regulations, 1940, the Commissioner of Transport may, without fee, issue a motor-driver's license under Part II of the said Act to any member of His Majesty's Forces . . . who is required for the purposes of any

"of those Forces to drive motor-vehicles and who satisfies the Commissioner . . . for the purpose that he is qualified to be the holder of a motor-driver's license. Any motor-driver's license issued under this regulation may at any time be revoked by the Commission. Unless so revoked, every such license shall continue in force until the end of the first complete month following the termination of the present war."

The war has not yet terminated: see s. 16 of the Finance Act, 1945.

Mr. *Gifford* submitted the above defence and I agree with him. However, Senior Sergeant Quayle made other submissions which have to be answered.

As the Army and Transport Department are concerned, those Departments have been given an opportunity to be heard. The Adjutant-General of the New Zealand Forces and the Commissioner of Transport both agree with Mr. *Gifford's* defence.

The facts were admitted—namely, that the defendant was at the time of the alleged offence a member of the Forces and at the time of the driving he was driving a private motor-car privately owned for a personal use.

The date of the issue of the license is August 27, 1942. The license states the period of the license as July 1, 1942, to June 30, 1943. Mr. Quayle submits that the license had lapsed.

Mr. *Gifford* contends, and I agree, that the period is fixed by the regulation and that there is no authority to limit it.

Mr. Quayle's main submission is that a license under the regulations is limited to the driving of Army motor-vehicles only, because of the wording of the regulation—namely, "who is required for the purposes of any of those Forces to drive motor-vehicles." This submission was not fully covered by the answering submissions. The power of the Commissioner of Transport as to whether more than one driver's license can be granted was not argued.

If Mr. Quayle's contention is correct, it would be necessary for a member of the Forces, when off duty, to obtain another license to drive his own private motor-car, if that can be obtained.

The Motor-vehicles Act, 1924, gives power to issue only one motor-driver's license covering the same class of vehicle. Section 21 includes the following sentence:—

"The holder of a motor-driver's license shall not be qualified to obtain another such license while the license so held by him is in force."

A member of the Forces with a license under the regulations empowering him to drive a private motor-car cannot obtain another license to drive his own private motor-car, for the latter would be "another such license" as it covers a common class—namely, "private motor-car." In my opinion the one license already issued covers both Army and privately-owned private motor-cars.

The license in question was issued under Part II of the Motor-vehicles Act, 1924, and the regulation so empowered the issue. The only difference the regulation makes is that the Commissioner of Transport issues it without fee, in lieu of the local authority with a fee.

In my opinion the words in the regulation—namely, “The Commissioner of Transport may . . . issue a motor-driver's license under Part II of the said Act to any member of the . . . Forces . . . who is required for the purposes of any of those Forces to drive motor-vehicles”—do not create a new class of license but refer to the usual license under Part II of the Act. The words “for the purposes of any of those Forces” signify only the power of the Commissioner of Transport in lieu of the local authority to issue a license under Part II of the Act.

The license under Part II of the Act covers all classes of licenses: see Reg. 2 of the Motor-drivers Regulations, 1940 (Serial No. 40/73). The regulation sets out the different classes of vehicles in the common form of license. It facilitates the provision that only one “such license” can be granted—for example, the holder of a license to drive a heavy trade motor shall by virtue thereof be authorized to drive any trade motor or any private motor-car; otherwise several licenses would have to be issued, for I think the word “such” refers to each class.

The present license issued by the Commissioner of Transport under Part II of the Act covers: “(1) Private motor-car (including light trade motor).” “Private motor-car” means a motor-car other than a passenger vehicle or taxicab as herein defined. “Motor-car” means a motor-vehicle designed solely or principally for the carriage of persons not exceeding nine in number.

It is therefore immaterial whether the “private motor-car” used on this occasion belonged to the Army Department or was privately owned. In either case it is a “private motor-car.” The license was intentionally and legally issued for any private motor-car, and, that being a distinct class, it is covered by the word “such.” Therefore only one license can be issued.

In my opinion the license is in order.

I should add that the object of the Act is to put off the road incompetent drivers. The regulation under which this license was issued amply safeguards the public.

The information is dismissed.

Information dismissed.

Solicitors for the defendant: *Ebbett and Gifford* (Hastings).

SMITH v. LOWER HUTT CITY COUNCIL.

1945. August 2, before Mr. A. M. GOULDING, S.M., in the Assessment Court at Lower Hutt.

Rates and Rating—Rating on Annual Value—Rateable Value—Assessment—Consideration of Rent fixed under Fair Rents Act, 1936—“Rateable Value”—Rating Act, 1925, ss. 2, 20.

When assessing the annual value of a residential property under s. 2 of the Rating Act, 1925, the provisions of the Fair Rents Act, 1936, may not be disregarded.

OBJECTION to assessment of annual value, pursuant to s. 19 of the Rating Act, 1925.

The local authority had assessed the annual value of the appellant's property for rating purposes at £180. The property was a large dwelling-house some forty-five years old, divided by a partition into two self-contained tenements, one of which was occupied by the owner himself, and the other by a tenant at £2 10s. per week. The City Valuer stated in evidence that he had arrived at his valuation by assessing the two tenements as worth £2 5s. and £2 1s. 6d. respectively, and, deducting 20 per cent. from the annual total, thus arrived at £224 8s.

Harding, for the appellant.

Gillespie, for the respondent.

GOULDING, S.M. (orally). Mr. *Gillespie*, for the respondent Corporation, referred to *Dunedin City Corporation v. Young* ((1941) 4 N.Z.L.G.R. 6); and he submitted that the question was what the property is actually let for. Here, what amounts to half the property is let for £2 10s. per week. He submitted that the Court will take into consideration the fact that this is a desirable residential locality in which houses are sought after.

For the appellant, Mr. *Harding* contended that the effect of *Dunedin City Corporation v. Young* was the exact opposite of that contended for. He submitted that the actual rent is immaterial, and the question is what a willing tenant would pay to a willing landlord. In that connection, he submitted, it is impossible to disregard the provisions of the Fair Rents Act, 1936; and he contended, moreover, that the fact that the present assessment represents 10 per cent. of the Government valuation is alone sufficient to condemn the assessment.

In my opinion, the effect of *Dunedin City Corporation v. Young* ((1941) 4 N.Z.L.G.R. 6) is as contended for by the appellant. The question what rent might be expected to be paid by a willing tenant to a willing landlord is clearly affected by the fact that the Fair Rents Act, 1936, applies to all dwellings; and, in my opinion, it is impossible to disregard the provisions of that Act when it comes to assessing annual value under s. 2 of the Rating Act, 1925.

As, in the present case, the appellant paid £2,250 for the property in November, 1942, and as that is the basic value for sale purposes, I am content to take it as the capital value for the purpose of calculating the rent that would be fixed under the Fair Rents Act, 1936. On that basis, the rent would be from £185 to £190. Deducting 20 per cent. as required by s. 2 of the Rating Act, 1925, this amount comes down to £140 and the assessment is accordingly reduced to £140.

The appellant is entitled to his costs, which I fix at £2 2s

Appeal allowed.

Solicitors for the appellant: *Webb, Richmond, Swan, and Bryan* (Wellington).

Solicitors for the respondent Corporation: *Bunny and Gillespie* (Wellington and Lower Hutt).

O'BRIEN v. WALKER.

1946. August 19, September 4, before Mr. J. H. Luxford, S.M., at Auckland.

Motor Traffic—Offences—Parking in Prohibited Area—Confusing Information relating to the Parking of Vehicles—Impossibility of ascertaining where Prohibited Area begins and ends—Dismissal of Prosecution—Traffic Regulations, 1936 (Serial No. 1936/86), Reg. 4 (7) (e)—Traffic Sign Regulations, 1937 (Serial No. 1937/159), Reg. 3 (4).

The Traffic Regulations, 1936, must be read together with the Traffic Sign Regulations, 1937, which extend and also modify them in certain respects.

Where there is confusion in the minds of drivers of motor-vehicles by reason of the failure of the local authority to give such drivers information as to the streets or parts of streets where parking is prohibited or restricted in the full and ample manner contemplated by the regulations, a prosecution for a breach of Reg. 4 (7) (e) of the Traffic Regulations, 1936, cannot succeed.

Observations on the duty cast on the local controlling authority to give supplementary notices on all parking-signs so that they can easily be read and understood.

INFORMATION charging the defendant with parking a motor-truck on Newton Road in the City of Auckland "on that part of the roadway where a notice is maintained by the controlling authority indicating that the parking of vehicles is prohibited."

The evidence showed that the defendant's vehicle was parked in Newton Road between the intersection of that road with Symonds Street and the "no-parking" sign. The distance between the corner of the intersection and the "no-parking" sign was 75 ft. The defendant stated in evidence that he believed that the prohibited area commenced at the disc and continued beyond it in the direction his vehicle was facing.

Cur. adv. vult.

LUXFORD, S.M. I believe the defendant's evidence and that in the particular circumstances he was justified in his belief.

The parking problem has become acute and serious in the City of Auckland, and the fines inflicted on persons who make a breach of the parking regulations—especially in prohibited areas—have been increased substantially. On the other hand, the system of indicating prohibited and restricted areas is in some cases confusing to the average motor-driver. In the city there are no fewer than fifty-three streets in which parking is either prohibited or restricted, and in some of those streets there are different classes of restriction. The average motor-driver could not reasonably be expected to remember all the streets or parts of streets where parking is prohibited or restricted; nor does the law

require him to do so. The offence created by Reg. 4 of the Traffic Regulations, 1936 (Serial No. 1936/86) (as amended by Reg. 4 of Amendment No. 1 (Serial No. 1939/76)), is in the following words :

" (7) No person or driver in charge of any vehicle having more than two road wheels shall stop, stand, or park such vehicle whether attended or unattended . . . :—

" In any part of a roadway where a notice, traffic sign, or marking or sign on the roadway is maintained by a controlling authority indicating that the stopping, standing, or parking of vehicles is prohibited, limited, or restricted, except in conformity with the terms of such prohibition, limitation, or restriction."

The Traffic Regulations, 1936, must, in my opinion, be read together with the Traffic Sign Regulations, 1937 (Serial No. 1937/159). Both are made under the Motor-vehicles Act, 1924, and the later regulations extend and also modify the earlier regulations in certain respects. Thus, the Traffic Sign Regulations contain diagrams of signs (called "Class D signs"), which must be used to convey information relating to the parking of vehicles; they also contain the following provisions: Reg. 3 (4) (i): ". . . the local authority shall erect the appropriate sign of Class D so as to give reasonable notice of any place where restrictions as to the parking of vehicles have been duly imposed" Reg. 3 (4) (iii): "Supplementary notices in explanation or extension of those given by the signs of Class D may be placed directly under the sign and on its support; and unless such a supplementary notice contains a direction to the contrary, the restrictions indicated by the sign shall be deemed not to apply during the hours between 6 p.m. and 8 a.m."

The word "parking" is also defined in Reg. 1 (2) as meaning—

"The standing of a motor-vehicle in any public place where such standing may lawfully be permissible, but does not include the standing of a motor-vehicle as aforesaid for any period not exceeding five minutes and does not include the standing of a motor-vehicle actually engaged in taking up or setting down persons or goods."

It is clear that the Traffic Regulations, 1936, when read with the Traffic Sign Regulations, 1937, are fair and reasonable; and the confusion that has arisen in complying with them comes from the Traffic Department of the City Council failing to give motor-drivers information in the full and ample manner contemplated by the regulations. Few, if any, drivers can tell where the prohibited area begins and where it ends. The best illustration of the uncertainty caused by the way the City Traffic Department carries out its obligations under the regulations is provided by the present prosecution. The Police laid the information against the defendant, and assumed that the whole of the south side of Newton Road was a prohibited area because a no-parking sign was placed on that side of the street at a distance of 75 ft. from the corner of its intersection with Symonds Street. On perusing the city by-laws, however, I find that Newton Road is not included in the fifty-three streets in which parking is either prohibited or restricted. The no-parking sign apparently was placed in position under the authority of cl. 4 (6) of By-law No. 18, which is as follows :—

"Where in any street . . . or any portion thereof directions prohibiting the parking or leaving of vehicles unattended . . . are exhibited by notice-boards or otherwise howsoever, then and in any such case no person being the driver of . . . any vehicle shall permit the same to remain stationary or unattended in such street or portion thereof, or otherwise than in accordance with such directions as the case may be."

The particular portion of the south side of Newton Road possibly affected by the no-parking sign is a narrow strip between the public convenience and the southern kerb. But the defendant's vehicle was not parked in that portion of the street. It is only conjecture on my part as to what area the no-parking sign refers to; no ordinary person would know exactly and for certain, but might reasonably assume it was placed in position to prevent a vehicle being parked there and so interfere with west-bound traffic along the street.

There is, in my opinion, a duty cast on the City Traffic Department to give supplementary notices on all parking-signs so that they can easily be read and understood. If this is not done, it is possible that many prosecutions will fail. The affixing of the supplementary notices should not cause any difficulty. All that is required is a notice containing the same information as appears in the schedule to By-law No. 18—for example in Britomart Place: "Full length both sides prohibited."

For the reasons I have given the information will be dismissed.

Information dismissed.

PALMER v. WASS.

1946. July 3, September 4, before Mr. J. H. LUXFORD, S.M., at Auckland.

Motor Traffic—Parking Restrictions—Offences—By-law prohibiting Vehicle from remaining Stationary in Street for more than Five Minutes—Faulty Parking-sign—Inconsistency of By-law with Traffic Regulations—Effect—Traffic Regulations, 1936 (Serial No. 1936/86), Reg. 4 (7) (e).

Where a city by-law prohibited the driver of a vehicle from permitting it to remain stationary in any named street for more than five minutes, and parking-signs in such a street did not give reasonable notice of the prohibition or reasonably lead any one to assume that the prohibition applied to one side of the street only, the information against an alleged offender should be dismissed.

It is immaterial that a local by-law prohibiting parking or restricting parking in certain city streets is inconsistent with the Traffic Regulations, 1936, because by s. 36 (5) of the Motor-vehicles Act, 1924, the by-law is deemed to be subject to the regulations; consequently, the position is the same whether or not an information for permitting a vehicle to remain stationary in a prohibited area is laid under the regulations.

O'Brien v. Walker (ante, 118) applied.

INFORMATION charging the defendant with a breach of Auckland City Council By-law No. 18, cl. 3 (1). The information set out that the defendant "being the driver of a motor-car No. 114-159 did permit "such vehicle to remain stationary on the eastern side of Kitchener "Street for more than five minutes."

The by-law under which the present prosecution was brought is as follows :—

"No person being the driver of . . . any vehicle shall permit
"the same to remain stationary in any street . . . set out in
"the schedule to this by-law in contravention of the restrictions and
"limitations set out in the said schedule in relation to each particular
"street . . ."

The schedule contains the following parking restrictions relating to Kitchener Street :—

"Courthouse Lane to Wellesley Street East : west side : not
"exceeding twenty minutes.

"Courthouse Lane to Princes Street : both sides prohibited."

The facts sufficiently appear from the judgment.

Horrocks, for the defendant.

Cur. adv. vult.

LUXFORD, S.M. The evidence shows that the defendant's car was parked on the east side of the street between Courthouse Lane and Princes Street ; also that the parking-signs did not give reasonable notice of the prohibition. No traffic sign at all was placed on the eastern side. It is true that on the south-west corner of the intersection of Courthouse Lane with Kitchener Street there is a notice diagonally placed on a telegraph-pole containing the words "Parking prohibited "below this sign on both sides of the street " above an arrow pointing to the north-east. A line following the direction in which the arrow is pointing would hit the eastern side of Kitchener Street behind the place where the defendant's car was parked. The defendant knew that this notice was there, but says he always thought it meant that the prohibited area commenced at an imaginary line running in the direction in which the arrow was pointing. Any other normal person would think the same. The notice is not visible to any driver turning into Kitchener Street from Warspite Street, and the no-parking notice on the western side of Kitchener Street reasonably leads any one to assume that the prohibition applies to that side of the street only.

The by-law is inconsistent with the Traffic Regulations, but that is immaterial, because by s. 36 (5) of the Motor-vehicles Act, 1924, it is deemed to be subject to the regulations. That is to say, the position is the same as if the information had been laid under the regulations. Indeed the form of the information indicates that the period of tolerance allowed by the regulations—namely, five minutes—has been given effect to.

I therefore hold that the defendant's car was not parked at a place in Kitchener Street where there was a notice, traffic sign, or marking

or sign indicating that the parking of vehicles was prohibited, and dismiss the information for reasons based on the judgment I have just delivered in *O'Brien v. Walker* (*ante*, 118).

Information dismissed.

Solicitors for the defendant : *Holmden and Horrocks* (Auckland).

[IN THE COMPENSATION COURT.]

TANSEY v. RENOWN COLLIERIES, LIMITED.

COMPENSATION COURT. Auckland. 1945. November 15. 1946. August 5.
ONGLEY, J.

Workers' Compensation—Accident arising out of and in the Course of Employment—Coronary Thrombosis—Effect of Effort considered—Change leading to Coronary Occlusion—Whether initiated by Effort—Conflict of Medical Opinion regarding Coronary Disease—Differentiation between Coronary Insufficiency and Coronary Occlusion—Whether assented to by Authoritative Opinion—Conflict in Expert Medical Evidence—Submission to Medical Referee for Report—Whether Court entitled to infer from Facts that Thrombosis precipitated by Worker's Earlier Unusual Exertion—Workers' Compensation Act, 1922, ss. 3, 5, 8 (2).

There are two schools of thought in the medical profession as to whether effort in some cases may initiate the changes that lead to coronary occlusion by thrombosis; in other words, whether effort may, in certain cases, be a factor in the production of haemorrhage into the wall of a coronary artery.

Quaere, Whether the suggestion that in coronary disease there may be on the one hand "insufficiency," and on the other "occlusion," has received the assent of medical opinion.

In an action for compensation where, as in the case under consideration, both experts agreed that the most likely diagnosis was infarction of the heart due to coronary occlusion by thrombosis, but differed as to whether effort might precipitate such a haemorrhage, and the learned Judge hearing the case submitted it to a medical referee for report pursuant to s. 58 of the Workers' Compensation Act, 1922,

Held, That, where the plaintiff had established a *prima facie* case that he suffered some cardiac deterioration at the time of the accident, and that case had not been displaced, the Court is entitled, after consideration of the whole of the medical evidence, to infer on the preponderance of probabilities that the thrombosis was precipitated as the result, in part, of some unusual exertion undertaken by the worker.

Adelaide Stevedoring Co., Ltd. v. Forst(1) followed.

Charlton v. Makara County(2) referred to.

(1) (1940) 64 C.L.R. 538.

(2) [1945] N.Z.L.R. 335.

In the present case, the learned Judge held that the facts showed that the plaintiff suffered from some deterioration at the time of the accident, being affected by arteriosclerosis, and then followed the sequence of accident, extra effort, pain, and disability due to thrombosis. The plaintiff had thus established a *prima facie* case, which had not been displaced; and he was entitled to compensation.

ACTION claiming compensation under the Workers' Compensation Act, 1922.

Plaintiff was employed by defendant company as a fireman-deputy, and on August 18, 1944, he was assisting two other colliers to lift a 13 ft. stringer into position. In doing this work he was awkwardly placed in an awkward position and lost control of the stringer, with the result that the end of it came against his chest and pinned him in such a way that he could not release himself. He said that, in endeavouring to free himself, he felt a severe pain across his chest, and that he was totally and permanently incapacitated by the accident.

The case came on for hearing before *O'Regan, J.*, on June 20, 1945, and by arrangement no medical evidence was called, the Court's attention being directed solely to the question whether the plaintiff was employed by way of manual labour. Judgment holding that plaintiff "was employed by way of manual labour" was given by *O'Regan, J.*, on July 10, 1945, and the case was continued before *Ongley, J.*, on November 15, 1945. No further evidence was called by plaintiff.

The facts and circumstances as given by plaintiff at the hearing before *O'Regan, J.*, were as follows:—

20 I am aged fifty-nine. I am a fireman-deputy employed by defendant. I was always employed by defendant during the matters relating to the accident. I have been in the mine forty-nine years. I started as fireman-deputy five years ago. I never had serious illness, but had a couple of accidents while at defendant's colliery. I never had anything wrong with my heart.

25 I never had any severe pain across my chest before August 18, 1944. After August 18 I had a very bad pain in my left arm. Just after 1 p.m. on August 18 I noticed something untoward. I had a quick lunch about 12.30 in the mine. The accident was after lunch. Mr. Kingi had lifted a big stringer and had put it over one end of what we call the "pigsty." It was 10 ft. up and I had the other end, struggling to put it up. I was turning round when it slipped down on my arm. I grabbed the other part of the pigsty. For the time being I was the pigsty and Kingi lifted the stringer off me.

35 I was standing on top of the skip and Kingi was on the floor. He handed the end of the stringer up to me and I put it on the pigsty. The stringer must overlap the pigsty 6 in. at each end. The stringer was 12 ft. or 13 ft. long and it must be long enough to cross both pigsties.

40 Kingi came to my assistance at the foot of the skip as he saw it slip, and he took the weight. When he took the weight I could not do anything because the pain came across my chest and in my left arm. Brazier and Kingi assisted me off the skip. The pain was as though something was tearing inside my chest. Where the men were working, I rested from fifteen to twenty minutes. I then went to the miner's face to fire a shot, and rested again. I did no more manual work that day. Nothing else happened that day relating to the accident except that my wind was a bit short, but nothing to speak of. I was able to walk home.

45 After I got home from work I had no pain, it was just like numbness in the fingers and arm. I would not say I had what you would call pain in the chest—it was a kind of soreness. I went to bed when I got home and stayed in bed till Monday morning at 6 o'clock. I returned to work on Monday, August 21. I had no pain till I started more timbering, and after I started timbering got severe pains again.

50 That day I did only shot-firing and supervising, but did no heavy work. On Tuesday I got very severe pain again. I was helping the men to put timber up. I went to Dr. Loten then, and he said it was a severe strain of the chest. He did not tell me it that day, but when he saw me in hospital. He did not X-ray me, but used his stethoscope. He gave me a bottle of medicine. On Wednesday,

55 August 23, there was a very heavy "creep" in the mine. The floor had nearly

lifted to the roof and we had to take the rails out. I assisted in lifting the rails and the lifting of the crossings. All the men's tools were buried, and I had to help them to get them out. That is when the very severe pain came on, and it lasted for two days. I went to work on the Thursday. I worked on helping to put the rails in for a new jig, but could not carry on and had to sit down practically all day. I went to work on Friday the 25th. That day I put a crossing in. I had pain that day. A crossing is where the rails come down to a single road from a double road. After I got home on Friday I sat down to my dinner and felt a bit sick. I did not eat any dinner, and the boy asked me to go to bed. After I lay down in bed the pains in my chest came and right down the arm. It was so severe that the boy had to go for the doctor. Dr. Jack came. I don't know what he said. He injected something to ease the pain. I was taken that night to Waikato Hospital, and remained there eleven weeks. Was discharged from hospital on November 8.

On that evidence, *Ongley, J.*, held that a *prima facie* case had been made out in that plaintiff had met with an injury by accident while exerting extra effort; that pain and disability followed immediately upon the accident; that the pain had persisted or recurred on exertion ever since the accident; that the pain was in plaintiff's chest, which was what was involved both by effort and by pressure from the stringer; and that, in the absence of medical or other evidence to the contrary, it seemed that the pain was caused by the accident.

To meet this *prima facie* case the defence called Dr. W. M. Porteous, of Hamilton, and Dr. T. W. J. Johnson, consulting physician, of Auckland.

Dr. Porteous diagnosed the injury as coronary thrombosis, but he did not know that plaintiff had met with an accident. He said:

I did not know he had had an accident in the mine. It is correct that my first diagnosis was based without any knowledge he had had a severe accident in the mine. I have not read the circumstances of the accident in the mine.

[*King* reads to witness the circumstances of the accident as set out in the judgment by *O'Regan, J.*:] I did not know until to-day that plaintiff was struck by the sapling as stated in the judgment. I had no knowledge of the events of the week of the accident until to-day. It is difficult to say, had I known before to-day those circumstances whether it would have affected my diagnosis. I do not think it would have affected my diagnosis. I say physical effort would have no relation to the thrombosis. I do not think the effort as proved here would incite the thrombosis. I do not think it would accelerate the thrombosis. I do not think external factors, such as effort, would in any way affect the thrombosis. Intimal haemorrhages no doubt can occur during effort, but they occur at other times. I do not think rupture of an atheromatous abscess could be attributed to effort. In my opinion rupture of a plaque could not be attributed to effort. I think it is a controversial matter. I do not think any intimal haemorrhage could be caused by effort—*i.e.*, haemorrhage of the coronary arteries. I would say an intimal haemorrhage would be conducive to a thrombosis. . . . I think the position with regard to this intimal haemorrhage as I see it is that it has frequently been claimed that intimal haemorrhage is caused by effort. The relationship has been denied by many others, and when I expressed my opinion before that effort and intimal haemorrhage are not related I was really giving my view. . . . I do not agree that severe effort might cause a haemorrhage in the wall of the coronary artery. The reactionary fall in blood-pressure would come after the effort had ceased. I think the fall of blood-pressure would favour thromboses if other factors tending to thrombosis were present too. I do not think that acting alone a fall in blood-pressure following exertion could be considered an adequate cause for thrombosis. I would not say the "other factors" referred to above include effort. . . . I think the answer to the question whether effort had any effect on the thrombosis is that coronary thrombosis is known to occur during sleep, during rest, during moderate exertion, and I think that where it does occur following severe exertion there is very little ground for connecting the exertion and the thrombosis. I agree the *British Encyclopaedia of Medical Practice* is a well-known work. Each year this work collates the works of well-known men. The opinions therein expressed are valuable opinions, but not necessarily accepted."

Dr. Porteous made it clear that there were two schools of thought on the question whether coronary thrombosis could be caused by effort,

but that, in his opinion, it could not be so caused. He gave well-considered and ample reasons for the opinion held by him. His view is summed up in his re-examination as follows :—

I have no reason to suggest that the electrocardiogram in this case is a misleading one. It fitted in exactly with what we anticipated from the physical finding and I think it is a typical electrocardiogram. It fitted in with my opinion that this was a typical coronary thrombosis not in any way connected with effort.

Dr. Johnson said :

Plaintiff's final disablement—*i.e.*, the illness which caused his disablement, was an anterior coronary thrombosis. To recapitulate his symptoms as given by him in evidence, the initial symptom of pain in the chest and in the left arm came on while he was making a heavy lift. He was really sustaining the weight of a heavy prop for several minutes, and this induced the pain as described which was an attack of angina of effort. Then each day thereafter until the day of his final breakdown he suffered the same type of pain under the same circumstances—*i.e.*, when he performed any heavy exertion. But on the day of his breakdown the pain was more persistent, he was sick in himself, and in the evening he eventually collapsed with extreme pain and distress, necessitating his removal to the Waikato Hospital. There investigation showed that he was suffering from a coronary thrombosis. The facts in favour of that diagnosis are : (a) History of attacks of angina of effort during the few days preceding his breakdown ; (b) the final breakdown and most severe breakdown occurred while he was home resting ; (c) the symptoms and findings of fever, an embolus, show clearly his illness was a thrombosis causing an infarct in the heart muscle on the front of the heart, and the electrocardiogram definitely confirms the diagnosis of an anterior infarct of the heart. The attacks of angina of effort were definitely caused by the lift on each occasion, and showed clearly that there was present in his coronary artery, hitherto unknown to him, narrowing of the artery. The attack of thrombosis was caused by a complication arising in the diseased artery entirely as the result of the disease and quite unrelated to any circumstance, effort, rest or sleep.

Intimal haemorrhages of the coronary artery and of other arteries are the result of a degenerative disease called atheroma which attacks all arteries of the body of every one, in some more than in others and in some vessels more than in others. Atheroma is a condition in which the strong muscular coat of the artery degenerates in patches into a soft material, and as this process proceeds, new capillary blood-vessels arise in the diseased tissue as an attempt of nature to try and heal, by means of the deposit of lime to harden off and calcify softened vessels which would of necessity be dangerously weakened. These vessels are microscopic in size, are capillary, have walls of the thickness of only one cell, are not supported in the usual way as our ordinary capillaries are, and are continually oozing and rupturing into the soft atheromatous tissue. That process is clearly seen by microscopic sections of diseased arteries, and it is present most commonly in the coronaries of the heart, in the brain vessels, and in the abdominal arteries. If this softened material, whether it is haemorrhagic or not, finds its way, as it frequently does, through the inner wall of the artery bulging into and encroaching upon the lumen of the artery, then the passing blood is liable to be deposited as a clot, and the clot gradually builds up, producing easily provoked attacks of angina of effort for a few days until the clot becomes big enough to block the vessel, when we then have a thrombosis. So that the formation of thrombosis is caused by the progressive disease in the vessel wall, and haemorrhages into it are only part of this disease nor are they necessary to induce the clot. That is the modern view of the formation of the clot inside an artery. I consider that the description given of the holding of this beam, the slipping of it, and the sustained effort to hold it with it lying in his arms pressing on his chest until relieved by his mates, did not cause injury to plaintiff's heart, directly or indirectly. You would expect any severe blow upon the front of the chest to cause abrasions or bruising of the skin on the front of the breastbone because the skin would be contused by the blow against hard bone, but the blow as described could not directly injure the heart because the type of injury that contuses the heart itself must be a squeezing or crushing of the chest directly from the fall backwards, and the back of the chest must be fixed against some object to enable the squeeze or the crush to drive the breastbone inwards, otherwise the individual gives before the impact. I have already said the injury described was not the kind of injury to cause that damage.

Dr. Johnson then went on to show that this is not a case of coronary insufficiency and drew attention to various distinctions between this case and coronary insufficiency. In cross-examination he said :

I say without a doubt that effort does not enter into thrombosis, and I might add that the process of a thrombosis in a coronary artery is identical with that which occurs just as frequently in a brain artery, and no doctor or physiologist, or anybody to my knowledge, has ever suggested that thrombosis of a brain artery can be precipitated by effort. I say effort does not incite the condition of thrombosis. Effort does not accelerate thrombosis or precipitate or initiate thrombosis, nor aggravate . . . I consider an intimal haemorrhage might incite a thrombosis. I do not agree that an intimal haemorrhage might be caused by a rupture of an atheromatous abscess or calcified plaque. I say that, on account of the fact that the capillary blood-vessels of the atheromatous patch are weakly supported and have very thin walls, they are new blood-vessels and do not have the stronger structure of the normal capillary, therefore spontaneous rupture is continually occurring unrelated with effort. . . . It is fair reasoning to say that if intimal haemorrhage causes thrombosis and it is accepted that effort causes intimal haemorrhage, then it is fair to say that effort caused the thrombus.

W. J. King, for the plaintiff. The fact that the plaintiff was injured at work, together with the circumstances and nature of the injury, established a *prima facie* case and placed on the defendant the onus of proving that plaintiff's incapacity did not result from the injury. [He cited *Morgan v. Westport-Stockton Coal Co., Ltd.*(1), *Charlton v. Makara County*(2), and *Jarvis v. One Tree Hill Borough*(3).]

Hore, for the defendant. The plaintiff has left his case in the position that the injury might be strain of the chest muscles, or, alternatively, might be coronary thrombosis; and the Court is not entitled to speculate when the case is left in that position. There is a vast difference between coronary thrombosis and coronary insufficiency: notwithstanding *Charlton's* case(4), coronary thrombosis is not an injury arising out of and in the course of the employment.

Cur. adv. vult.

ONGLEY, J. [After stating the facts and summarizing the evidence, as above:] Mr. *King* cited Dr. Williams's statement marked (a), in *Charlton's* case(1) following the words "the effort involved in using a cross-cut saw single-handed"(2). The whole question as to whether effort can cause an intimal haemorrhage depends on whether the raised blood-pressure by effort has direct access to these capillary vessels in the wall of the artery. These vessels are supplied, not from the lumen of the coronary artery, but by their own vessels, called the vasa vasorum, which nourish all arteries and reach the artery from the exterior, permeate the walls and thereby nourish them. They do not enter into the lumen and it is only very occasionally in diseased arteries that a small capillary microscopic in size enters actually into the lumen. Now, although the rate of flow through the coronary artery is increased by effort, the demand for blood by the arterial wall is not influenced one whit. Consequently it does not alter. Furthermore, the blood-pressure within the coronary arteries is not raised concomitantly with the general arterial pressure. The coronary circulation is speeded up by the fact that during exertion the coronary arteries alone amongst all arteries of the body have the peculiar property of dilating in response to exertion, and if you dilate a vessel its pressure does not then rise equally with the pressure from the adjoining aorta which supplies it. That is my reason for not agreeing with Dr. Williams. The extent of the dilatation

(1) [1944] N.Z.L.R. 859, 866, 867.

(2) [1945] N.Z.L.R. 335.

(3) (1940) 3 N.Z.L.G.R. 221, 232.

(4) [1945] N.Z.L.R. 335.

(1) [1945] N.Z.L.R. 335.

(2) *Ibid.*, 339.

of the artery due to increased effort may well vary with a man's age. With effort you have general blood-pressure and on the termination of effort a reactionary fall in the blood-pressure. I do not agree that during that reactionary fall there is coronary thrombosis. The thrombosis under that theory should have occurred on the 18th when he lifted the stringer. The disability which followed the 18th to the 25th was a forerunner of the thrombosis which occurred on the 25th.

Dr. Johnson was cross-examined at length. Authorities were cited to him with a view to showing that thrombosis can result from effort. His view is summed-up in answer to one authority put to him in cross-examination as follows :—

The term "acute myocardial infarction" includes both insufficiency and occlusion. I have not said that effort causes insufficiency. I am not certain that in coronary disease you may have on one hand insufficiency and on the other occlusion. This article is a recent article in the *Heart Journal* put there for the consideration of the medical public—it is a thesis—and has not received the assent of medical opinion. I am not in a position at present to say if I approve of that article. I rule out occlusion being due to any kind of effort. I am not satisfied in my mind as a result of this article, and this is the only article in the whole of our medical works where such a suggestion is put up.

On this evidence, it seemed that this was not a case of coronary insufficiency (*Charlton's* case) and that the questions for determination were whether effort could cause a thrombus, and, if so, whether thrombosis had been caused by the accident in this case.

It appeared from the evidence of Dr. Porteous and Dr. Johnson that there are two schools of thought on the question whether thrombosis can be caused by effort, one school holding that thrombosis can be caused by effort, and, in some cases, is caused by effort. The view that thrombosis can be caused by effort is contrary to what has generally been put forward and accepted in this Court. The position has been that thrombosis has been relied on and accepted as an answer to compensation claims, on the basis that effort cannot cause thrombosis. Thrombosis is pleaded as an answer in this case. The decisions that have been given are decisions on the evidence given in these cases and are not binding in this case, where the evidence is different. In those cases the evidence was that thrombosis could not be caused by effort. In this case the evidence is that it may be, and I have got to decide whether it was.

In these circumstances I submitted the case to Dr. D'Ath for report, under s. 58 of the Workers' Compensation Act, 1922. I have now received his report. It is as follows :—

REPORT OF MEDICAL REFEREE.

The following material was submitted for my consideration :—

1. The judgment of *O'Regan, J.*, dated July 10, 1945.
2. The notes of evidence of the first hearing, dated June 20, 1945.
3. The notes of evidence of the second hearing, dated November 15, 1945.
4. The Waikato Hospital records of Tansey's case.

The History of Plaintiff's Case.

On August 18, 1944, plaintiff was assisting two other colliers in lifting into position, at a height of 10 ft., a stringer 13 ft. in length and 6 in. in diameter. One end of the stringer had been placed in position, and while Tansey was struggling to place the other end in position, from his stand on an empty truck, he lost his balance, as well as control of the stringer, the end of which dipped and pressed against his chest. His fellow-

workers came to his assistance, and taking the weight of the stringer, released him.

When Tansey was released, he states that "I could not do anything, "because the pain came across my chest and in my left arm."

He rested for from fifteen to twenty minutes, and on resuming duty did no more manual work that day. During the remainder of the evening he apparently had no pain, but a soreness of the chest and a feeling of numbness in the left arm and fingers. Shortly after reaching home, he retired to bed, remaining there over the week-end, till 6 a.m. on Monday the 18th. On Tuesday, he again suffered pain while doing timbering work and was obliged to rest and do no more manual labour that day. On Wednesday, while assisting to clear a "creep" in the mine, severe pain came up and lasted for two days. On Thursday, he attempted to help with the putting in of rails for a new "jig," but was unable to carry on and had to sit down practically all day. On Friday, the 25th, he assisted in putting in a crossing. The pain was present on that day. When he reached home on Friday, he was unable to eat his dinner, and in fact, felt so unwell that he went to bed. The pain then became so severe that a doctor was called. The doctor administered a hypodermic injection to relieve the pain, and Tansey was conveyed to the Waikato Hospital in the evening, where he remained for eleven weeks.

The diagnosis made at the Waikato Hospital was infarction of the anterior wall of the heart due to coronary thrombosis.

Discussion.

This case presents a problem of considerable importance to the workers' compensation aspect of coronary artery disease. Medical interest in this common form of heart disease has intensified in recent years and much new light has been shed on its underlying pathology. This interest was stimulated by the researches of J. C. Paterson [1] in 1936. Paterson showed that the common underlying cause of coronary thrombosis was haemorrhage into an atheromatous area in the wall of the coronary artery itself. Within the succeeding five years, Paterson's observations had been fully confirmed by numerous other investigators and had received general acceptance. Statistics indicate that approximately one-half to two-thirds of all cases of coronary occlusion occur as a result of antecedent haemorrhage into the wall of a coronary artery. The inciting causes of this form of haemorrhage have been much debated in medical literature in recent years, and have given rise to two opposing schools of thought.

While these two opposing schools agree on most of the problems associated with the results of this haemorrhage, the difference of opinion revolves round the point as to whether effort may, in certain cases, be a factor in the production of haemorrhage into the wall of a coronary artery.

The main exponents of the view that effort may be a factor are Paterson of Toronto [2], Plumgart of Harvard [3], Boas of Mt. Sinai Hospital and Columbia University [4], and E. N. Nelson of Belfast [5], the only British writer on this subject. On the other hand, Master and his associates [6] of the Mt. Sinai Cardiac Clinic of New York take the opposite view, that haemorrhage into the wall of a coronary artery is a condition independent of effort or occupation, and that it arises in the natural course of the disease itself. They believe that it is the end-result of a progressive degenerative arteriosclerotic process and is probably a fortuitous event.

It is necessary, therefore, to critically examine the views of these two opposing groups of investigators, all of whom are recognized authorities in their particular fields of cardiology.

All are agreed on the fundamental pathology of coronary occlusion.

- 5 All accept the view that the majority of cases of coronary occlusion result from antecedent haemorrhage into the wall of a coronary artery. All are agreed that this haemorrhage can be the end-result of the natural progress of a degenerative sclerotic process in the wall of a coronary artery. They differ on this important point, however, as to whether
- 10 there may be, in some cases, certain direct, immediate, or precipitating causes which are responsible for initiating these haemorrhages at a given time. In other words, are there certain precipitating or exciting factors which may be responsible for accelerating or changing the natural course of the disease?

- 15 Master and his associates maintain that the course of the disease is unaltered in its natural inevitable progress by any external factor. The evidence which they deduce in support of this contention is in the main statistical. From the examination of the histories of 1,400 cases of coronary artery occlusion, they found that 53·4 per cent. occurred
- 20 while the patient was asleep or at rest, 44·5 per cent. occurred during mild or moderate exertion and 2 per cent. during some unusual degree of exertion.

- The school of thought which opposes Master and his associates agrees that coronary occlusion often occurs while the individual is at rest or
- 25 asleep, and that in many cases no antecedent injury or effort has taken place. But, in their view, to argue from this that such accidents are not competent causes of coronary occlusion is incorrect. They believe, from their experience, that bodily effort may, in some cases, directly induce the closure of a coronary artery with consequent cardiac
- 30 infarction, and that this appears to be of sufficient frequency to be of practical clinical importance, as well as of medico-legal significance. It is their opinion that the accepted studies of Paterson[1], [2], Winternitz[7], and others suggest how unusual exertion may bring about coronary artery occlusion. Boas puts the matter briefly and
- 35 clearly when he says :—

- With physical effort there is a sudden alteration of arterial pressure, cardiac action is increased, rupture of one of the capillaries in the arterial wall may occur, or a softened atheromatous plaque may rupture into the arterial lumen. If the
- 40 haemorrhage is large there may be almost immediate occlusion of a coronary artery. If the haemorrhage is small or slow, or if it is followed by a gradually growing mural thrombus, the occlusion may develop slowly or remain incomplete.

- There is considerable variation in the time that elapses before the full symptoms and incapacity develop. In many instances extensive cardiac damage occurs immediately after the accident, or follows within a few hours. In others, there is
- 45 a free interval of many hours, or even of several days between the accident and the development of major cardiac damage, and during this interim the patient may complain of little beyond weakness and some uneasiness in the chest. In still other cases there are continuous symptoms of minor cardiac embarrassment after the accident, but these may not be severe enough to incapacitate the patient. Finally,
- 50 after days or even weeks, a complete coronary occlusion occurs, leading to complete disability.

- When an unusual strain during work is followed by cardiac disability in the sense outlined, and when this occurs in a person who has been previously well and free from symptoms while at work, it is proper to conclude that the disability was
- 55 induced by the work, and is therefore compensable.

It is with this latter school of thought that I agree. After careful and critical analysis of all the recent literature on the subject, I have been strengthened in my opinion that there is now sufficient clari

and pathological evidence to warrant the deduction that effort is, in certain cases, the determining factor in the onset of coronary occlusion.

Recognition of the fact that effort can induce cardiac infarction makes it necessary to evaluate each case on its merits. It may be said in a general way that where a patient's complete disablement follows immediately on the incident of effort to which the disability is ascribed, the causal connection will usually be clear. Where, however, the final episode of complete disability is delayed for some hours or days, there must be a continuity of symptoms dating from the event to the actual moment of complete disablement.

Medical Evidence.

Both Dr. Porteous and Dr. Johnson agreed that the most likely diagnosis was infarction of the heart due to coronary occlusion by thrombosis. Dr. Porteous admitted that intimal haemorrhage may be a causative factor in thrombosis of a coronary artery, but denied the possibility that effort may, in some cases, precipitate such a haemorrhage.

Dr. Johnson has reviewed, in the first part of his evidence, the relationship of atheroma of the coronary arteries to subsequent thrombus formation. In cross-examination, Dr. Johnson agreed that intimal haemorrhage may incite thrombus formation, but denied that effort can incite such haemorrhage. His reasons for this opinion are, however, open to criticism. He says in evidence :—

The whole question as to whether effort can cause an intimal haemorrhage depends on whether the raised blood-pressure by effort has direct access to these capillary vessels in the wall of the artery. These vessels are supplied, not from the lumen of the coronary artery, but by their own vessels called the vasa vasorum, which nourish all arteries and reach the artery from the exterior, permeate the walls and thereby nourish them. They do not enter into the lumen, and it is only very occasionally in diseased arteries that a small capillary, microscopic in size, enters actually into the lumen.

This statement is at variance with that of the majority of writers on this subject. Paterson of Toronto, to whom we are indebted for discovering and describing intimal haemorrhages due to capillary rupture, and who showed their relation to coronary thrombosis, maintains that the majority of the new capillary vessels from which intimal haemorrhages take origin arise directly from the lumen of the coronary artery and a minority only arise from the vasa vasorum. Even those writers who maintain that the majority of these vessels arise from the vasa vasorum agree that a not insignificant number also arise from the coronary lumen.

Dr. Johnson says further :

Furthermore, the blood-pressure within the coronary arteries is not raised concomitantly with the general arterial pressure. The coronary circulation is speeded up by the fact that during exertion the coronary arteries alone amongst all arteries of the body have the peculiar property of dilating in response to exertion, and if you dilate a vessel its pressure does not then rise equally with the pressure from the adjoining aorta which supplies it.

This view, however, ignores the fact that in cases of coronary artery disease, such as the one under discussion, widespread atheromatous changes of the proximal portions of the coronary arteries prior to their ramification within the heart-muscle may render dilatation of the affected portions impossible.

Dr. Johnson's main objections to the possibility of a relationship between effort and intimal haemorrhage cannot therefore be sustained.

The probability or otherwise of an alternative diagnosis of acute coronary insufficiency was dealt with at some length in the medical evidence. The history, clinical course, and electrocardiographic find-

ings, however, do not conform to the requirements for the diagnosis of this condition as laid down by the original German authors and subsequently elaborated by Master and his associates in America.

Summary.

- 5 Advances during the last ten years in the knowledge of coronary artery disease and its consequences have rendered many previous conceptions regarding this disease obsolete. Particularly is this so in regard to coronary artery occlusion by thrombosis. The view, so often expressed in years gone by, that "coronary thrombosis not being due
10 "to effort, cannot be an injury by accident" must now be revised in the light of newer knowledge.

There is now sufficient clinical and pathological evidence to support the view that effort, in some cases, may initiate the changes which lead to coronary occlusion by thrombosis.

- 15 In Tansey's case, I am of the opinion that it is a proper deduction from the evidence that the accident on August 18, 1944, initiated those changes in the coronary artery which terminated by occlusion with its accompanying collapse and disablement on August 25, 1944.

- 20 The answer to the question put to me by the Court—namely, "was the incapacity caused, or materially contributed to by the work Tansey "was doing?" is therefore in the affirmative.

REFERENCES.

- [1] Paterson, J. C.—*Vascularization and Haemorrhage of Intima of Arteriosclerotic Coronary Arteries*. Arch. Path. 22. 1936, 313.
- 25 [2] Paterson, J. C.—
(a) *Capillary Rupture with Intimal Haemorrhage as a Causative Factor in Coronary Thrombosis*. Arch. Path. 25. 1938, 474.
(b) *Relation of Physical Exertion and Emotion to the Precipitation of Coronary Thrombi*. J.A.M.A. 112. 1939, 895, 2346.
30 (c) *Correspondence on Coronary Thrombosis*. Am. Heart J. 19. 1940, 243.
- [3] Blumgart, Schlesinger, and Davis.—*Studies on the Relation of the Clinical Manifestations of Angina Pectoris, Coronary Thrombosis, and Myocardial Infarction to the Pathological Findings*. Am. Heart J. 19. 1940, 1.
- 35 (a) Blumgart, H. L.—*The Relation of Effort to Attacks of Acute Myocardial Infarction*. J.A.M.A. 128. 1945, 775.
- [4] Boas, E. P.—
(a) *Angina Pectoris and Cardiac Infarction from Trauma or unusual Effort*. J.A.M.A. 112. 1945, 1887.
40 (b) *Cardiac Infarction induced by Unusual Effort*. J. Mount Sinai Hosp. 7. 1941, 307.
(c) *Some Immediate Causes of Cardiac Infarction*. Am. Heart J. 23. 1942, 1.
- [5] Nelson, M. G.—*Intimal Coronary Artery Haemorrhage as a Factor in the Causation of Coronary Occlusion*. J. Path. and Bact. 53. 1941, 115.
- 45 [6] Master, Dack, and Jaffe.—
(a) *Activities Associated with the Onset of Acute Coronary Artery Occlusion*. Am. Heart J. 18. 1939, 434.
50 (b) With Grishman: *Coronary Occlusion, Coronary Insufficiency, and Angina Pectoris*. Am. Heart J. 27. 1944, 803.
(c) With Grubner: *Differentiation of Acute Coronary Insufficiency with Myocardial Infarctions from Coronary Occlusion*. Arch. Int. Med. 67. 1941, 647.
- [7] Winternitz, Thomas, Le Compte.—
[5 (a) *The Biology of Arteriosclerosis*, 1938.
(b) *Studies in the Pathology of Vascular Disease*. Am. Heart J. 14. 1937, 399.

I allow plaintiff £26 5s. costs in respect of both hearings plus witnesses' expenses, in accordance with the Magistrates' Court scale, for the lay-witnesses called at the first hearing. Failing agreement by counsel, these will be settled by the Registrar.

Judgment for the plaintiff accordingly.

Solicitors for the plaintiff: *King, McCaw, and Smith* (Hamilton).

Solicitors for the defendant: *Buddle, Richmond, and Buddle* (Auckland).

[IN THE MAGISTRATES' COURT.]

SHADBOLT *v.* THE KING.

1946. February 4, 14, before Mr. J. H. LUXFORD, S.M., at Auckland.

War Emergency Legislation—Defence Emergency Regulations—Compensation—Domain Board by Deed purporting to grant a Lease of Domain Lands—Land subject to the Deed entered upon for Defence Purposes—Such Lease Ultra vires the Board—Failure of Claim for Compensation—“Any estate or interest in any land”—Defence Emergency Regulations, 1941 (Serial No. 1941/130), Reg. 18 (3).

Land, in which the claimant alleged he had an “estates” “interest” within the meaning of Reg. 18 (3) of the Defence Emergency Regulations, 1941, was entered upon for defence purposes. The claimant alleged he had suffered loss thereby, and claimed compensation.

A public domain within the meaning of the Public Reserves Domains, and National Parks Act, 1928, was placed under the control of a Borough Council, as a Domain Board, under s. 48 of that statute. In 1939, the Council and the claimant entered into a deed whereby the claimant was to have the use of the land subject to certain terms and conditions. The deed purported to create a leasehold estate or interest in land.

Held, That the Council, as such Domain Board, had no statutory authority to grant a lease and, since the deed evidenced a contract, which the Council has no power to make, it was void and of no effect in so far as vesting in the claimant any “estate or interest” in land, within the meaning of those words in Reg. 18 (3) of the Defence Emergency Regulations, 1941; and the claim accordingly failed.

ACTION claiming compensation under the Defence Emergency Regulations, 1941 (Serial No. 1941/130). The claimant alleged that certain

and in which he had "an estate and interest" was entered upon under the regulations, and that he had suffered loss by reason of the use of the land for defence purposes.

The land in question was a public domain within the meaning of the Public Reserves, Domains, and National Parks Act, 1928, and had been duly placed under the control of the New Lynn Borough Council in accordance with s. 48 of that statute.

On January 16, 1939, the Council and the claimant had entered into a deed whereunder the Council agreed to let the defendant have the use of the land subject to certain terms and conditions. First, the claimant, who was described in the deed as "the Honorary Ranger," covenanted to undertake a number of specified caretaker duties in respect of the land. Secondly, the Council imposed the following conditions and limitations on the claimant's right to use the land: —

- (a) Any stock grazed on the land must be confined to the area by efficient fences to be provided and maintained by the claimant to the approval of the Council, and the grazing of any bull or other animal likely to be a danger to any person entering upon the land is hereby prohibited, unless such bull or other animal is securely tethered:
- (b) The claimant to keep the land clear of noxious weeds:
- (c) The public to continue to have the use of the right-of-way at present existing from the entrance on Portage Road to the footbridge over the Whau Creek.
- (d) The claimant to have the right to cultivate for cropping purposes the whole or any part of the area providing he obtains the prior written consent of the Council who may withhold consent or grant the same on such terms and conditions as it thinks fit.

Claimant in person.
Rosen, for the Crown.

Cur. adv. vult.

LUXFORD, S.M. [After stating the facts, as above:] Counsel for the Crown has raised two legal defences, and I decided to deal with them before hearing evidence as to the damage caused to the land by reason of the entry made on it, for defence purposes.

The first ground of defence is that the deed under which the claimant alleges that he has an estate or interest in the land is void because the Council had no legal power to grant to the claimant the rights purporting to be conferred thereby. The second ground of defence is that even if the Council had such power, the rights conferred on the claimant do not amount to an estate or interest in land within the meaning of the regulations.

The deed, in my opinion, does purport to create a leasehold estate or interest in land. It must be construed as giving the defendant the right exclusively to use the whole of the land subject only to the reservations and conditions set out in cl. 2, in consideration of the services agreed to be rendered by the claimant. The legal effect of the deed, assuming that the Council had power to enter into such a contract, is to create a lease of the land.

The powers of the controlling authority of a public domain, whether the authority be a specially constituted Domain Board or a local body specially authorized under the Act, are limited to those expressly given by the Act, and, in my opinion, should be strictly interpreted. A public domain is, as its name indicates, an area of land to be enjoyed by the public at large, and nothing done by the controlling authority which derogates from their rights can be supported unless clearly within the express powers conferred on the authority by the Act.

There is nothing in the Act which gives the controlling authority power to grant leases. Such domain lands as may be available for leasing may be leased by the Governor-General. There is a limited power to grant exclusive use of domain lands to persons or societies for the purpose of particular sports, games, or other recreation, or for camping-sites and the like, but no power to grant any license or other easement or right to any private person for other purposes.

It follows that the deed of January 16, 1939, evidences a contract which the Council had no power to make, and is therefore void and of no effect in so far as it purports to create in favour of the claimant a leasehold estate or any lesser interest in the land, the subject-matter of the present proceedings. I must therefore dismiss the claim with costs against the claimant.

Action dismissed.

Solicitors for the Crown: *Meredith, Meredith, Kerr, and Cleal* (Auckland).

MACFARLANE v. WELLINGTON CITY CORPORATION.

1945. March 23, May 3, before Mr. A. M. GOULDING, S.M. (Chairman) and Mr. H. E. ANDERSON, member nominated by the appellant, and Mr. J. M. DALE, member nominated by the respondent, at Wellington.

Municipal Corporation—Powers—Local Act authorizing Council to impose Conditions on Consent to Subdivision—Construction of Drains for Disposal of Sewage and Storm-water—Stream running through Proposed Subdivision—Condition imposed that Stream be reculverted in Concrete Pipe—Condition invalid—"Storm-water"—Wellington City Empowering and Amendment Act, 1929 (Local), s. 4—Municipal Corporations Act, 1933, ss. 226, 227, 228.

The word "storm-water," as used in s. 4 of the Wellington City Empowering and Amendment Act, 1929, means water—that is, rain—which falls during atmospheric disturbances, and not water which flows permanently in a defined stream and which has its source either in springs or percolation through the soil. Under the section, all that the Wellington City Council can do is to arrange for the disposal of the storm-water from the owner's land which, in time of rain runs over the surface of that land and is not absorbed by it.

Consequently the Wellington City Council has no power under s. 4 of the statute, before approving a subdivision, to impose the condition that the stream crossing the owner's land be entirely reculverted where it passes through her land by a 3 ft. concrete pipe of which the Council would pay half of the cost up to a specified amount.

APPEAL under the provisions of s. 332 (3) of the Municipal Corporations Act, 1933, and s. 4 (3) of the Wellington City Empowering and Amendment Act, 1929 (Local), against the decision of the Wellington City Council whereby it approved of a certain subdivision of land in Karori belonging to the appellant subject to the condition that the stream crossing the appellant's land be entirely reculverted where it passed through her land by a 3 ft. concrete pipe at the estimated cost of £310, of which the Council would pay half the cost up to but not exceeding £155.

The following statement of fact was agreed to by the parties :—

(1) Paragraphs 1, 2, and 3 of the case stated are deemed to be incorporated herein and acknowledged to be correct—as follows :—

“1. The above-named Leslie Winifred MacFarlane (hereinafter “referred to as ‘the owner’”) is the registered proprietor of all that “parcel of land situated in the City of Wellington containing two “roods four and forty-seven hundredth perches (2r. 4.47 p.) “being part Section 37 of the Karori District and being also Lot 4 “on Deposited Plan Number 10312 having a frontage of 224.77 links “to Friend Street.

“2. During the year 1944 the owner, being desirous of sub- “dividing the said land into two allotments, caused a plan thereof “to be submitted to the respondent for its approval as required by “the above-mentioned Acts.

“3. After some negotiations the respondent on the fifteenth “day of November, 1944, decided that the said subdivision be approved “on condition that the stream crossing the owner's said land be “entirely reculverted where it passes through the owner's said land “by a three-foot concrete pipe at an estimated cost to the owner “of three hundred and ten pounds (£310), of which the respondent “would defray half the cost up to an amount not exceeding one “hundred and fifty-five pounds (£155).”

(2) Attached hereto is a plan showing the said land, the proposed subdivision, the approximate position of the stream crossing the said land, &c.

(3) Satisfactory provision has been made for the discharge of sewage and storm-water from the house on the said land.

(4) The said stream is not a public drain.

(5) Apart from the waters of the said stream (which the respondent affirms and the owner denies are included in the term “storm-water”) the only storm-water coming from the owner's said land is—

(a) Storm-water from the said house for which provision has been made aforesaid.

(b) Water which falls on the said land. This water follows the natural fall of the land and part reaches the said stream and part may possibly reach the water-channel in Friend Street.

(6) In its course from the owner's said land through Karori towards the sea, the said stream is culverted in some places, and is open in other places. Some portion of this culverting work has been done by the Wellington City Council, and other portions by private owners.

(7) From the point where the said stream leaves the owner's said land, it is, as shown in the said plan, culverted for some distance to the satisfaction of the respondent.

(8) The purpose of the respondent in imposing the said conditions is in accordance with its usual policy in such cases—*viz.*, that when the surrounding district becomes more closely settled, the said stream can be entirely culverted and constituted a public drain, without the whole cost of the culverting work falling on the respondent.

R. Gilkison, for the appellant.
Earle, for the City Council.

Cur. adv. vult.

The judgment of the Board was delivered by

GOULDING, S.M. The short question which falls for decision is whether the condition sought to be imposed by the Council is valid or not. Subsections (1) and (2) of s. 4 of the Wellington City Empowering and Amendment Act, 1929, read as follows:—

“4. (1) The Wellington City Council may, in consenting to any subdivision of land under the provisions of the Wellington City Empowering Act, 1917, or under section three hundred and thirty-five of the Municipal Corporations Act, 1920, impose such conditions as to the construction by the owner of the land of public and private drains for the disposal of sewage and storm-water from the said land as such Council thinks fit.

“(2) For the purposes of the enactments specifically mentioned in subsection one of this section any division of land to which the said statutory provisions relate, whether into two or more allotments, shall be deemed to be a subdivision of that land for the purposes of sale if at least one of the allotments is intended for disposal by way of sale.”

Now this is a Local Act, and as such should be strictly construed: see *Maxwell on the Interpretation of Statutes*, 7th Ed. 257, 258:

“Enactments of a local or personal character which invest private persons or bodies for their own benefit with privileges and powers interfering with the property or rights of others are construed against those persons or bodies more strictly than any other kind of contract.”

The Act empowers the Council to impose conditions with regard to drainage which will throw burdens on property owners. In accordance with the principles to be applied in construing such an Act, those powers ought not to be extended beyond the scope given by the Act itself.

The appellant's land is at least 4 ft. above Friend Street, and there would be a good grade to carry off any storm-water in that direction. The stream which passes through appellant's land is a defined and permanent one, a natural stream or watercourse. It carries a substantial flow of water, and has its source of origin far above appellant's land.

It is agreed by both parties that if the stream is culverted as demanded sewage cannot be discharged into it. That would be contrary to the Health Act. Nor would culverting it in the manner asked make it a public drain.

Under s. 220 of the Municipal Corporations Act, 1933, it is enacted—

“220. Without prejudice to the wider meaning of the term ‘public drain,’ it is hereby declared that every drain in a borough that has actually, and whether legally or not, been under the control of any Borough Council, County Council, Road Board, or Town Board for not less than twenty years as a drain shall be deemed to be a public drain under this Act.”

It is clear that the Municipal Corporations Act recognizes that surface water may be led into streams or watercourses whether they are covered or open: see s. 226. Sections 227 and 242 are a clear recognition that there can be covered watercourses as distinct from public or private drains. So that what the Council asks the appellant to do may not achieve the object of s. 4 of the Empowering Act. The object of that Act is the construction of public or private drains. Whether when the work requisitioned is done the stream would be a private or public drain or a covered watercourse is open to doubt.

Moreover, under the Act, what is it the City Council has power to compel an owner to drain into such drain? It is sewage or storm-water from his land. We need not consider the question of sewage. Storm-water is nowhere defined in the Act. It should be given its ordinary plain meaning—namely, water (that is, rain) which falls during atmospheric disturbances.

It is argued for the Council that all the water coming down the Karori Stream is storm-water. We cannot agree with that. Water which flows permanently in a defined stream and which has its source either in springs or by percolation through the soil cannot possibly be regarded as storm-water. Storm-water is the water which in time of rain runs over the surface of land and is not absorbed by the land. It may find its way into permanent streams and admittedly such permanent streams carry much storm-water in time of heavy rain.

Moreover, s. 4 clearly says that what the Council can ask the owner of the land to do is to arrange for the disposal of storm-water from the owner's land. Those words cannot be disregarded. It is clearly unnecessary in the case before the Board to insist that the appellant should put in a 3 ft. concrete pipe to carry storm-water from her land.

We think, therefore, that the City Council has no power to impose the condition it has sought to impose under the Empowering Act, 1929, and that the appeal should be allowed.

And the Board doth hereby award the appellant the sum of £10 10s. costs against the respondent—each party to pay the fee of its own nominated member of the Board.

Appeal allowed.

Solicitors for the appellant: *Pringle and Gilkison* (Wellington).
Solicitor for the respondent: *City Solicitor* (Wellington).

[IN THE PRIVY COUNCIL.]

AUCKLAND ELECTRIC POWER BOARD *v.* PUBLIC TRUSTEE AND ANOTHER.

JUDICIAL COMMITTEE. 1946. July 15, 16, 17; October 10. LORD THANKERTON, LORD MACMILLAN, LORD SIMONDS, LORD DU PARCQ, LORD NORMAND.

Electric-power Board—Electrical Supply Regulations—Electrical Wiring Regulations—Regulations purporting to be made in Exercise of Statutory Power—Regulation requiring Power Board to make Periodical Inspections and Tests of Consumer's Installation at intervals of not more than Five Years to ascertain Installation's Freedom from Electrical Hazard—Regulation obliging Power Board to discontinue supply of Consumer whose Installation in Dangerous Condition—Whether such Regulations ultra vires—Public Works Act, 1928, s. 319 (2) (b)—Electrical Wiring Regulations, 1935 (1935 New Zealand Gazette, 2539), Regs. 12-02, 12-03—Electrical Supply Regulations, 1935 (1935 New Zealand Gazette, 2496), Regs. 51-43, 52-01, 52-03.

Section 319 of the Public Works Act, 1928, applies only to electric lines of the Power Board licensee (as defined in subs. 3 of that section), including such installations (if any) on the premises of consumers as are the property and under the control of the licensee, and has no reference to lines which are the property and under the control of the consumers. The regulation-making power conferred by s. 319 (2) (b) relates, therefore, only to the use and management of the licensee's works and lines. Consequently, any regulation that purports to constitute obligations on the Power Board's part of repair and maintenance in respect of consumer's lines and installations is *ultra vires* the power conferred by s. 319.

It follows, therefore, that Regs. 51-43, 52-01, and 52-03 of the Electrical Supply Regulations, 1935, submitted as the foundation of the appellant's liability, were *ultra vires* and ineffectual for that purpose. Regulation 12-02 of the Electrical Wiring Regulations, 1935, applies only when there are new installations on the consumer's premises; and was therefore inapplicable to the facts of this case.

The allegation of negligence at common law, altogether apart from any breach of regulations, on which the judgment of *Fair, J.*, was based in the Court of first instance, and which found no support in the Court of Appeal, was not maintained before their Lordships, and it accordingly was dismissed from further consideration.

Judgment of the majority of the Court of Appeal, *Callan, Kennedy*, and *Northeroft, JJ.*, *Sir Michael Myers, C.J.*, and *Blair, J.*, dissenting, reported [1944] N.Z.L.R. 782, 801, reversed; and the judgment of *Fair, J.*, set aside.

APPEAL from the judgment of the Court of Appeal, reported (1944) 5 N.Z.L.G.R. 166, dismissing an appeal from and varying the judgment of *Fair, J.*

Sir Valentine Holmes, K.C., and *H. M. Rogerson* (of the New Zealand Bar), for the appellant. 5

C. L. Henderson, K.C., and *Maurice Smith*, for the respondents.

Cur. adv. vult.

The judgment of their Lordships' Board was delivered by LORD NORMAND. This is an appeal from a judgment of the Court of Appeal of New Zealand(1) affirming by a majority the judgment of 10

(1) (1944) 5 N.Z.L.G.R. 166.

Fair, J., in the Supreme Court(2). The action was brought under the Deaths by Accidents Compensation Act, 1908, and the Law Reform Act, 1936, by the Public Trustee of the Dominion of New Zealand as executor of Francis Harold Baker, deceased. The defendants were

- 5 (i) the present appellants, who were the suppliers of electric power to the respondents, (ii) the appearing respondents, John Burns and Co., Ltd., who were the employers of the deceased, and (iii) H. K. Brown and Co., Ltd., electrical contractors, who performed certain repairs and maintenance services under a contract for services with the respondents.
- 10 The ground of the action as laid is that the death of Francis Harold Baker was caused by the negligence or breach of statutory duty of the defendants or of one or more of them. The plaintiff was awarded damages or compensation against the appellants and the respondents. The respondents have acquiesced in the judgment against them, but
- 15 they appear in this appeal because they have an interest to support the judgment which involves the appellants along with themselves in the liability to pay the compensation.

The material facts must now be stated. They are in part admitted and in part found by the jury in answers to questions settled by *Fair, J.*, and there is now no serious controversy about them. The appellants are a statutory corporation constituted by the Auckland Electric-power Board Act, 1921-22, and they are suppliers of electricity under license granted by the Governor-General in Council. They have since 1935 supplied electric power to the Holdship and Morton buildings belonging

25 to the respondents from electric mains which are connected to a main switch just inside the Holdship building and near the main entrance to it from Customs Street, Auckland. From this main switch wires were laid to the main switchboard, and from the switchboard electric energy was directed into the various electrical circuits in the respondents' buildings. The lines or conductors between the main switch and the

30 switchboard, the switchboard itself, and the circuits and electric apparatus connected to or supplied with current from the switchboard were the property and under the control of the respondents. The appellants, on the other hand, owned and had control of the lines leading from the street to the main switch. The appellants had inspected the respondents' electrical installations in 1935 before connecting their cables to the main switch, but no inspection had been made by them since July, 1935. On August 18, 1941, a plug on a circuit used for energizing an adding-

35 machine in the respondents' office in the Holdship building was accidentally broken, and one of the prongs was broken off and remained in the socket. H. K. Brown and Co., Ltd., had then been for some time working on the respondents' electrical installation, and one of their employees, Campbell, was asked by an employee of the respondents to repair the broken plug. Campbell used a screwdriver to remove the

40 broken fork, and there was an instant flash at the plug which set fire to the Holdship building and so caused Baker's death. The flash was the result of a sustained arc on the respondents' switchboard, and the sustained arc was in a sense brought about by the electric short-circuit caused by the use of the screwdriver by Campbell. But there would

45 have been no flash and no fire if there had been no defects at the switchboard. In fact, however, there were two defects. The cut-out on the adding-machine circuit was designed as a 10-ampere cut-out, and it required for safety that the fuse or fuse-link fitted to the cut-out should fuse at not more than a 20-ampere current and should be covered

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with a tube or stockinette of asbestos. But on the occasion of the fire the cut-out was fitted with a fuse or fuse-link capable of carrying approximately 40 amperes and it was not covered with an asbestos stockinette. The second fault was that on the base of the cut-out there was a copper deposit which acted as a conductor after the fuse-link was blown. Such a copper deposit is usually formed by blowings of fuse-links which have not been protected by asbestos stockinette. These two defects and the short-circuit caused by the unskilled use of the screwdriver by Campbell provided all the conditions necessary for the causation of a sustained arc. It is not possible on the evidence to say when the fuse-link in use when the fire occurred was fitted, nor when the copper was deposited on the base of the cut-out. These things may have occurred at any time between the inspection of the installation by the appellants in July, 1935, and the moment when Campbell set to work on the plug with his screwdriver.

In the statement of claim particulars of breaches of statutory duty alleged to have been committed by the appellant and to have contributed to the fire are set out in detail. There is also an allegation of negligence at common law and altogether apart from any breach of regulations. This was the ground on which the judgment of *Fair, J.*, is based, but it found no support in the Court of Appeal and it is not now maintained. Accordingly it may be dismissed from further consideration.

The case on breach of regulations is met at the outset by the appellants with the answer that the material regulations are *ultra vires*. They are to be found in the Electrical Supply Regulations, 1935, and the Electrical Wiring Regulations, 1935, both of which purport to be made in pursuance of the Public Works Act, 1928. The issue between *intra vires* and *ultra vires* depends primarily on the construction of s. 319, the provisions of which are set out in the case for the appellant and also, so far as they are material, in the judgment of the Chief Justice. It is needless to repeat them here, because the learned counsel for the respondents conceded the point argued for the appellants, that the section applies only to the electric lines (as defined in subs. 3) of the licensee, including such installations (if any) on the premises of consumers as are the property and under the control of the licensee, and has no reference to lines which are the property and under the control of consumers. The regulation-making power conferred by subs. 2 (b) relates, therefore, only to the use and management of the licensee's works and lines. This accords with the opinion expressed by the Chief Justice, though he did not make it the ground of his dissenting judgment. *Blair, J.*, in his dissenting judgment, and the three learned Judges who formed the majority also concur with the Chief Justice in this view. Their Lordships are of opinion that the construction now conceded by the respondents is the correct construction of the section. It follows that any regulation which purports to constitute obligations of repair and maintenance in respect of consumers' lines and installations is *ultra vires* of the power conferred by s. 319.

The basis of the case against the appellants is that they failed in a duty under the regulations to inspect the respondents' installation, and that if they had inspected it they would have discovered that the installation was in a dangerous condition, and they would then have had, under the regulations, a duty to cut off the current. The respondents' counsel founded on three regulations in the Electrical Supply Regulations. One of these (Reg. 51-43) is in the part of the regulations dealing with inspection and testing of consumer's installations and

the other two (Regs. 52-01, 52-03) are in the part dealing with maintenance of consumer's installations.

Of these three regulations, only Reg. 52-03 expressly lays on the licensee a duty to discontinue to supply a consumer whose installation is dangerous. But the obligation is conditional. It depends on the consumer's failing, not simply failing but failing subject to the qualification implied by the word "so," to maintain his installation and every appliance connected therewith. The qualification implied by the word "so" is (so far as this case is concerned) that the consumer's failure was in breach of an obligation in Reg. 52-01 to maintain free from electrical hazard the installation and every appliance connected with it on his own premises, except any apparatus or service-line belonging to the licensee. But the obligation which Reg. 52-01 purports to lay on the consumer is *ex concessis* null and of no effect because it is *ultra vires*. It follows that the obligation in Reg. 52-03 being conditional on the non-observance of a null regulation must also be null and of no effect.

An attempt was made to save Reg. 52-03 by reading it as if it were contingent merely on the fact that the consumer had not maintained his installation free of hazard. This reading of the regulation underlies the reasoning in the judgments of the learned Judges who formed the majority in the Court of Appeal. But their Lordships are of opinion that such a construction is inadmissible and that the dependence of Reg. 52-03 on the occurrence of a breach by the consumer of a purported obligation sanctioned by a pecuniary penalty as provided in Reg. 71-11 cannot be read out of the regulations. That would be to carry beyond permissible limits a freedom in interpretation which a Court may sometimes properly assume, *magis ut res valeat quam pereat*.

Regulation 51-43 requires the electrical-supply authority to make periodical inspections and tests of consumer's installations at intervals of not more than five years for the purpose of ascertaining that the installation and every appliance connected with it is free from electrical hazard. Learned counsel for the respondents argued that this regulation taken by itself provides sufficient grounds for affirming the liability of the appellants. The argument, if it is to be of value to the respondents in this case, requires that the obligation to inspect should be construed as continuously subsisting after the lapse of five years from the last made inspection, and that the duty to inspect should be treated not as an end in itself but as implying a subsequent duty to take some effective action if the inspection has disclosed (or would have disclosed if it had been made) dangerous defects. But assuming that the argument is sound so far, their Lordships are not of opinion that the only effective action which can be implied is the cutting-off of the electric current by the licensee. On the contrary it appears to their Lordships that it is equally reasonable to imply a duty to notify the consumer, such as is imposed in certain circumstances by Reg. 52-02. Their Lordships are further of opinion that the regulations dealing with the inspection and testing of consumers' installations and the regulations providing for the maintenance of these installations dovetail into each other. The scheme of these regulations is that the duty of maintaining the consumer's installation lies on him; if a defect is found on inspection by the licensee, he should notify the consumer, and then it is for the consumer to remedy it forthwith; and, if he fails to do so, the licensee must discontinue the supply, but the consumer then has the right to apply for an inspection by an inspecting engineer (Reg. 51-45). This is accordingly not a case

in which it is possible to separate Reg. 51-43 from Regs. 52-01 and 52-03, and to hold it to be an *intra vires* regulation standing by itself.

Regulations 12-02 and 12-03 of the Electrical Wiring Regulations, also founded on by the respondent's counsel, do not, in the opinion of their Lordships, advance the case for the respondents. Regulation 12-02 applies where there are new installations on the consumer's premises and accordingly does not affect this case. Regulation 12-03 requires that it shall be a condition of every license under the Public Works Act, 1928, empowering an electrical-supply authority to supply a consumer that the licensee shall not continue to supply electrical energy to any existing installation which is not reasonably free from electrical hazard. The Electrical Wiring Regulations contain many regulations which it is conceded are not authorized by s. 319 of the Public Works Act, 1928. It might nevertheless be possible to separate this particular regulation as a valid exercise of the power to prescribe the conditions on which a license may be issued. If so, a breach of the regulation would give a right of action only to the licensor. But even if it is legitimate to construe the regulation as going beyond that and as requiring the licensee to discontinue supply to a consumer whose installation is not reasonably free from electrical hazard, the obligation to discontinue can, as the respondent's counsel conceded, only arise if the licensee knows or ought to know of the defect. The obligation thus depends on the obligation to inspect and stands or falls by Reg. 51-43 of the Electrical Supply Regulations, and, since that regulation is invalid, so also is this as the foundation for the supposed obligation.

The result is that their Lordships are of opinion that the regulations which were submitted to them as the foundation of the appellants' liability are *ultra vires* and ineffectual for that purpose. It is irrelevant to say that the same regulations might competently have been made under another statute, or that regulations might have been made in another form under s. 319 of the Public Works Act, 1928, imposing on licensees a duty to inspect consumers' installations and a duty to discontinue supply, without associating these duties with duties imposed *ultra vires* on the consumer or in respect of the maintenance of consumers' lines. Their Lordships are concerned only with the Order in Council and the regulations as they find them and not as they might have been. The conclusion which their Lordships have reached makes it unnecessary to consider whether, if the regulations founded on had been valid, the breach of them was the cause of the fire, and whether the breach would give rise to any private right of action.

Their Lordships are of the opinion that the appeal should succeed and that the judgment against the appellant should be set aside. The costs of the appellants in the Courts in New Zealand should be paid by the plaintiff, the Public Trustee of the Dominion of New Zealand, and by John Burns and Co., Ltd. The costs of H. K. Brown and Co., Ltd., of the hearing in the Supreme Court should be paid by the plaintiff. The plaintiff should be entitled to recover from John Burns and Co., Ltd., all the costs for which he is rendered liable. Their Lordships will humbly so advise His Majesty.

The respondents, John Burns and Co., Ltd., must pay the costs of this appeal.

Appeal allowed, and judgment against the appellant Board set aside.

Solicitors for the appellant : *Bartlett and Gluckstein* (London), agents for *Nicholson, Gribbin, Rogerson, and Nicholson* (Auckland).

Solicitors for the respondents : *Wray, Smith, and Co.* (London), agents for *Earl, Kent, Stanton, Massey, North, and Palmer* (Auckland).

[IN THE SUPREME COURT.]

STEELE v. HEWITT.

SUPREME COURT. Wanganui. 1946. November 7. FAIR, J.

By-law—Building-permit—Building erected without Building-permit required by By-law—Building, when erected, in Compliance with all Requirements—Whether the Existence of the Building after its Completion a Continuing Offence of “causing or permitting” its Erection—“Commence to erect”—“Cause or permit the erection”—Municipal Corporations Act, 1933, ss. 370 (3), 371.

Section 370 (3) of the Municipal Corporations Act, 1933, refers to the continued existence of a work in any physical state or condition contrary to any by-law, and not to the continued existence in a sound, physical, engineering, and hygienic condition of a completed work, which, complying with all necessary requirements for every purpose, has been erected without the required permit.

A city building by-law provided that “(a) No person shall erect, or commence to erect, any building without first obtaining a permit from the “engineer”; and “(b) No person shall cause or permit the erection of any “building if a building-permit in that behalf has not first been obtained from “the engineer.”

There was provision, both in another by-law and in s. 371 of the Municipal Corporations Act, 1933, for the local authority to make ample provision to deal with buildings existing in contravention of any by-law.

The appellant was convicted of commencing the erection of a building without first obtaining a building-permit as required by the above-recited by-law, and was fined under the authority of s. 370 of the Municipal Corporations Act, 1933, as for a continuing offence over a period from May 15 to 31, 1946. The building was completed before June 10, 1946.

Subsequently, on another information, he was convicted of “causing or “permitting” the erection of the same building without first obtaining a building-permit, the period over which it was alleged the offence had been committed being stated as from June 11 until July 14, 1946.

The learned Magistrate, who heard that information, held that, a building-permit not having been obtained under s. 370 (3) of the Municipal Corporations Act, 1933, the offence with which the appellant was charged was a continuing one, so long as the building continued in existence irrespective of its com-

pliance with all the necessary requirements, convicted the appellant and fined him 5s. a day for the said period.

Upon appeal from such conviction,

Held, That, on the above-stated interpretation of s. 370 (3) of the Municipal Corporations Act, 1933, as the judgment appealed from was founded on the assumption that there was a continuing offence after the building work was completed, the appeal must be allowed and the conviction quashed.

Marshall v. Smith(1) referred to.

James v. Wyvill(2), *Airey v. Smith*(3), *London County Council v. Worley*(4), and *Rumball v. Schmidt*(5) distinguished.

(1) (1873) L.R. 8 C.P. 416.

(4) (1894) 71 L.T. 487.

(2) (1884) 51 L.T. 237.

(5) (1882) 8 Q.B.D. 603.

(3) [1907] 2 K.B. 273.

APPEAL under s. 166 of the Magistrates' Courts Act, 1928, from a judgment of a Stipendiary Magistrate at Wanganui.

The appellant had been charged before the Magistrate with the committal of an offence against the Wanganui City Building By-law which provides :

(a) No person shall erect, or commence to erect, any building without first obtaining a permit from the engineer.

(b) No person shall cause or permit the erection of any building if a building-permit in that behalf has not first been obtained from the engineer.

The Magistrate set out the facts in his judgment, and it appeared from those facts that on May 27, 1946, the Wanganui City Council laid an information against the appellant, alleging that he had, on May 15, caused or permitted the commencement of the erection of a building without first obtaining a building-permit as required. That information came on for hearing on June 10, and the defendant pleaded " Guilty " to the charge. At that time, there was some doubt as to when the work had been completed, but the appellant was convicted and fined as for a continuing offence over the period from May 15, 1946, to May 31, 1946, being fined £16 under the authority of s. 370 of the Municipal Corporations Act, 1933.

Then, on July 24, 1946, the City Council laid the information which was the subject of the present appeal, alleging against the appellant that he caused or permitted the erection of the same building without first obtaining a building-permit. That information was heard in the Magistrates' Court on September 2, and was amended so as to cover the period over which it was alleged the offences had been committed as being from June 11 until July 24. It was agreed that the work itself had been completed before June 10, 1946.

On the hearing of that second information, the question was argued as to whether the appellant was liable for a penalty, and the Magistrate finally decided he was liable, and convicted and fined him 5s. a day for the period from June 11, 1946, to July 24, 1946, a total of £11, with costs and solicitor's fees making an additional £3 13s.

C. N. Armstrong, for the appellant. As no building work was done after June 10, then, unless the original erection of the building is held to be a continuing offence, no offence could be committed after June 10. The work was actually completed on May 31, and the penalty was imposed in respect of the period from May 15 to May 31. The offence for which the appellant was convicted is not a continuing offence : see s. 370 (3) of the Municipal Corporations Act, 1933, which contains an exhaustive definition of " continuing offence." The Court

cannot extend the meaning of a penal statute beyond the words used : *Maxwell on the Interpretation of Statutes*, 7th Ed. 227 ; and, if a statute intends to create a continuing offence, it uses express words, and an offence must be clearly within them.

- 5 Reliance is placed on the learned Magistrate's interpretation of s. 370 (3) concerning the erection of a building "without first obtaining a permit." Nothing done thereafter can remedy the offence of not having obtained a permit. If the offence is a continuing one, the appellant would be liable to a penalty from day to day till his death.
- 10 Even if a subsequent permit were obtained, or the construction of the building complied with every by-law, the appellant would still, technically, be liable, because a permit was not obtained before the building was erected. Therefore, it was obviously not the intention of the Legislature to make it a continuing offence : see *Marshall v. Smith*(1), where a
- 15 stronger provision than the one before the Court was held not to create a continuing offence. Reference should also be made to s. 370 (2) : and see *James v. Wyvill*(2).

- Even if the offence was in law a continuing offence, then the second prosecution was not in accordance with the by-law. The notice in
- 20 writing required before taking proceedings was not given.

C. F. Treadwell, for the respondent. The by-laws of the Wanganui City Council are standard city by-laws, as adopted throughout New Zealand. The offence was a continuing one, and this case is indistinguishable from *James v. Wyvill*(3) and *Airey v. Smith*(4).

- 25 Section 370 (3) of the Municipal Corporations Act, 1933, is not exhaustive as to continuing offences. The words "in a state" in that subsection mean "when a building has been completed without a permit," and, consequently, a building "in a state" contrary to the by-law is unauthorized work. The appellant completed the building before
- 30 he made application for a permit ; this was refused ; he went on with his building—these facts constitute a continuing offence.

- As to the second offence, no notice is necessary under By-law No. 112 (b). *Marshall v. Smith*(5) is distinguishable, as it was decided before the passing of the Health Act, 1875 (38 & 39 Vict., c. 55) (*13 Halsbury's Complete Statutes of England*, 58) : see *Reay v. Gateshead Corporation*(6),
- 35 decided on the same section as in *James v. Wyvill*(7)—namely, s. 115 of the Health Act, 1848 (11 & 12 Vict., c. 63).

Armstrong, in reply.

- FAIR, J.* (orally) [After stating the facts, as above:] It is to be noted that the first information was for "commencing" the erection
- 40 of the building without the permit, and the second information was for "causing or permitting" the erection of the building.

- The question arising on this appeal is as to whether the Magistrate's judgment is right in law. The Magistrate himself in the course of his judgment states that if he had been free to construe the provisions of
- 45 s. 370 (3) of the Municipal Corporations Act, 1933, free from authority, he would have considered that the second information should be dismissed, as the offence was completed on June 10, when the erection of the building had been completed, and that no offence was committed after that

(1) (1873) L.R. 8 C.P. 416, 423.

(2) (1884) 51 L.T. 237.

(3) (1884) 51 L.T. 237.

(4) [1907] 2 K.B. 273.

(5) (1873) L.R. 8 C.P. 416.

(6) (1886) 55 L.T. 92, 102.

(7) (1884) 51 L.T. 237.

date. But, on considering the authorities that were cited to him, he thought that they obliged him to hold that this offence was a continuing offence, and that the appellant was liable to a fine not exceeding £5 for every day, or part of a day, during which the building (which had been erected without the permit being obtained) continued in existence, in the form in which it was erected. 5

Now, that conclusion, as Mr. *Armstrong* submitted, was a very startling one, and the results that follow from it are so unusual and surprising that the Court is bound to examine the position with great care before it can accede to the view that that is what the law means; 10 because, as he pointed out in his argument, if that view is accepted, then, once an offence of this sort has been committed, the offender may remain liable to a penalty of £5 per day for his lifetime, or during the existence of the building which has been erected without the permit—whichever is the shorter. It would also follow that, if a building were 15 erected which not only complied with all the ordinary requirements of the City Engineer's office, but also all necessary requirements for every purpose, yet if it were erected without the permit it would subject its owner to this liability which he could only escape by destroying it.

Mr. *Treadwell* said, in answer to that, that in the latter circumstances 20 at least proceedings would not be taken. But that, of course, is not quite the point. If there is the power to take them, then the question is whether the law provides for such an extraordinary and unusual position—whether that is the effect of the subsection. One would think it is not, and I agree with the learned Magistrate that, so far as 25 the words of s. 370 (3) are concerned, in their ordinary meaning, they do not apply to such a state of affairs as that under consideration in this appeal. They provide :

The continued existence of any work or thing in a state contrary to any by-law, shall be deemed to be a continuing offence within the meaning of this section. 30

That, according to the ordinary and natural meaning of the words, which, as I mentioned during the course of the argument, is the "golden rule" of construction, means the existence of the work in any *physical state or condition* contrary to any by-law. Its ordinary meaning does not extend to its continued existence in a sound, physical, engineering, 35 and hygienic, and other condition, but having, as it were, "a blot on its escutcheon" by its originally not having been lawful, although its condition or state is satisfactory from every other possible point of view. Its illegal origin cannot fairly be described as a factor in the state of the building. 40

To read the words as covering the non-obtaining of preliminary consent or permit would be a straining of their ordinary meaning; and, far from the principles of construction allowing that, the opposite view applies to a statute of this kind. Being a penal statute (and properly 45 penal, in order to ensure compliance with requirements necessary in the interests of the public), it has to be strictly construed, in the sense that any penalties are not to be imposed beyond the plain meaning of the words used.

Where a man is to be punished, as I have said recently, the Legislature is assumed to make it clear what is to constitute the offence. If 50 there is a doubt whether he is intended to be reached, the construction to be adopted is that the provision should not apply to him, or the conditions, unless it was quite clear that they were to be applied to him.

That ordinary construction is confirmed, too, by the rule of construction that has been referred to in some of the cases that I shall deal with later. For there is provision, both in the by-law itself and in the statute in s. 371, for the local authority to make ample provision to deal with
5 buildings existing in contravention of any by-law. So a reasonable method of construction is to apply the remedy to each offence in accordance with the facts of the case.

Where a permit has not been obtained, then there is a breach in commencing the work without a permit, and in continuing the erection
10 without a permit, and a penalty is provided for that. Where the building itself exists in a physical state or condition which is contrary to a by-law, s. 373 provides that that is a continuing offence, and s. 371 authorizes the Council to take all steps necessary to remedy or remove the building—the physical condition of which is contrary to the by-
15 law. Clause 112 of the Building By-law itself deals comprehensively with such a situation, and seems to give the local body ample power to see that any structural or other defects or omissions are remedied. There is no necessity, therefore, to make the offence of failing to obtain a permit before completing the erection a continuing offence, when there is ample
20 remedy in other ways where there is a real necessity for it.

That is all I have to say on the general question; but perhaps I should refer to the cases which the learned Magistrate has referred to, and state why I consider them inapplicable.

First, it does not seem to me that the passage cited from *24 Halsbury's*
25 *Laws of England*, 2nd Ed. 90, para. 160, seems hardly applicable. The two cases, *James v. Wyvill*(1) and *Airey v. Smith*(2), were decided on different provisions, which have this fundamental difference from the present case. In both these cases the provisions of the statute considered, and the by-laws considered, definitely show by their phraseology
30 that the continued existence of a building erected without a permit was to be regarded as a continuing offence. That was made plain in both instances, beyond any real ground of question, and so it differs from the provisions I have considered here. And, as Mr. *Treadwell* very properly pointed out to the Court, in such cases, too, the Legislature
35 had earlier intervened more than twenty years ago and provided that the continuing penalty should not extend over a period of more than one year. The very fact of that provision would indicate that it is unlikely that the Legislature would impose a continuing penalty, such as it is submitted it did in the present case, which might continue for the
40 whole of a person's life.

Then, *London County Council v. Iborley*(3) is subject, I think, to the same considerations as *James v. Wyvill*(4) and *Airey v. Smith*(5).

In the decision of *Rumball v. Schmidt*(6), the Court seemed to attach
45 very considerable importance to the fact that the local body there concerned had no power to pull down or remove a building erected contrary to the Building By-laws without a permit; and for that reason it considered that a continuing penalty was contemplated by the Bench in order to make the remedy effective. But that does not apply here, where there is the power conferred by s. 371 of the Municipal Corporations Act, and, following on that power, the provisions in the Building
50 By-law No. 112, which is most comprehensive and most effective and

(1) (1884) 51 L.T. 237.
(2) [1907] 2 K.B. 273.
(3) (1894) 71 L.T. 487.

(4) (1884) 51 L.T. 237.
(5) [1907] 2 K.B. 273.
(6) (1882) 8 Q.B.D. 603.

seems to enable every reasonable course to be taken to enforce the duties of the local body.

On the other hand, one finds in *Marshall v. Smith*(7) a decision of a strong Court holding that this kind of provision enacted in very similar circumstances did not create a continuing offence; and that decision was approved and distinguished in *Rumball v. Schmidt*(8). 5

For these reasons, and seeing that the conviction was founded on the assumption that there was a continuing offence after the building work was completed, the appeal must be allowed, with £8 8s. costs, and the conviction quashed. 10

Appeal allowed.

Solicitors for the respondent: *Treadwell, Gordon, Treadwell, and Haggitt* (Wanganui).

Solicitors for the appellant: *Armstrong, Barton, and Armstrong* (Wanganui).

(7) (1873) L.R. 8 C.P. 416.

(8) (1882) 8 Q.B.D. 603.

[IN THE SUPREME COURT.]

LOWER HUTT CITY CORPORATION v. MARTIN AND OTHERS.

SUPREME COURT. Wellington. 1946. October 17, November 10.
JOHNSTON, J.

Municipal Corporations—Powers—Subdivision of Land—Local Act authorizing Council to impose Conditions as to Drainage on Consent to Subdivision—Construction by Owner of "All public and private drains for the disposal of sewage from the said land"—No Power to Compel Owner to construct Public Drain—Whether Conditions imposed as to Sewage Drain unreasonable—Municipal Corporations Act, 1933, s. 33 (4)—Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), s. 5.

Statute—Interpretation—Statute not open to Test of Reasonableness—Right of Appeal from Local Authority to Statutory Board—Test applicable to Council's Administration.

Section 5 (1) of the Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), provides as follows:—

"The Council may, in consenting to any subdivision of land under section three hundred and thirty-two of the Municipal Corporations Act, 1933, impose such conditions as to the construction by the owners of the land of all public and private drains for the disposal of sewage and storm-water from the said land as the Council thinks fit."

The Council sought to impose as a condition of its consent to a subdivision of the defendant's land fronting a public road that he pay half the cost of a sewer-drain extension along that road for a distance of 534 ft., at a cost of from £130 to £150. The defendant appealed under s. 332 (3) of the Municipal Corporations Act, 1933, and under s. 5 of the Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), against the decision of the Council to impose that condition. The appeal was heard by the statutory Board appointed *ad hoc* by the Governor-General under s. 332 of the Municipal Corporations Act, 1933, which allowed his appeal on the ground that, as the power conferred by s. 5 (1) of the Empowering Act, 1941, to impose conditions on owners of land as to the construction of "public drains" was inoperative in the absence of the power to compel the owner to construct a public-sewage drain, the condition imposed was *ultra vires*; and, even if there were such a power, it was unreasonable to compel him to contribute to the construction of a public-sewage drain which would be used for carrying sewage from other lands as well as his own: reported *Ante*, p. 15.

On motions for mandamus to command the members of the Board to hear and determine on its merits the said appeal, and of certiorari for the purpose of removing into the Supreme Court the Board's decision,

Held, 1. That s. 5 (1) of the Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), does not call for an interpretation by the Supreme Court that limits its scope by reason of the fact that its exercise interferes with the rights of ownership; and it cannot be submitted, as a by-law can, to the test of reasonableness.

2. That, by virtue of s. 5 (2) of the statute, the right of appeal given to the person aggrieved by the imposition by the Council of a condition renders administration under s. 5 liable to the test of reasonableness having regard to the obligations of the Council and the rights of the appellant, in each case a question of fact; and the question of *ultra vires* does not arise.

3. That, as the Board had before it all relevant evidence available upon which to reach the decision complained of, the conclusion must be accepted as a *bona fide* answer to the question before the Board.

Consequently, there was no material upon which to order mandamus or certiorari; but this decision did not amount to a declaration that the defendant was entitled to have the plan of the subdivision approved and registered, or give any expression of opinion as to the effect of the Board's decision, or whether or not the Council had to approve the plan without drainage conditions of any kind.

MOTIONS for writ of mandamus to command the members of a Board constituted under s. 332 of the Municipal Corporations Act, 1933, to hear and determine on its merits an appeal by one Martin against a decision of the plaintiff Corporation, reported *Ante*, p. 15; and
5 for an order vacating the decision of the Board therein; and, alternatively, for an order that a writ of certiorari do issue to the members of the said Board for the purpose of removing into the Supreme Court the decision of the said Board.

The surveyor for the second defendant, Charles Martin, the owner
10 of some 3 acres of land with a frontage to the Western Hutt Road, on April 10, 1945, applied to the plaintiff Council for its approval of a subdivisional plan showing two lots containing approximately 21½ perches. Each lot had a frontage to the road. The Works Drainage and Town-planning Committee of the Council on May 7 agreed to consider favour-
15 ably the application conditional on an undertaking by Martin to provide half the cost of necessary drainage extension.

On May 14, the Council's Town Clerk wrote to the surveyor advising him the Town-planning Committee had recommended the Council to approve the proposal subject to the condition that Martin pay half
20 the cost of the drainage extension necessary, and added: "I would be glad to have your acceptance of these terms." Martin's solicitors then wrote requesting the Committee to consider the condition that

seems to enable every reasonable course to be taken to enforce the duties of the local body.

On the other hand, one finds in *Marshall v. Smith*(7) a decision of a strong Court holding that this kind of provision enacted in very similar circumstances did not create a continuing offence; and that decision was approved and distinguished in *Rumball v. Schmidt*(8). 5

For these reasons, and seeing that the conviction was founded on the assumption that there was a continuing offence after the building work was completed, the appeal must be allowed, with £8 8s. costs, and the conviction quashed. 10

Appeal allowed.

Solicitors for the respondent: *Treadwell, Gordon, Treadwell, and Haggitt* (Wanganui).

Solicitors for the appellant: *Armstrong, Barton, and Armstrong* (Wanganui).

(7) (1873) L.R. 8 C.P. 416.

(8) (1882) 8 Q.B.D. 603.

[IN THE SUPREME COURT.]

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Municipal Corporations—Powers—Subdivision of Land—Local Act authorizing Council to impose Conditions as to Drainage on Consent to Subdivision—Construction by Owner of "All public and private drains for the disposal of sewage from the said land"—No Power to Compel Owner to construct Public Drain—Whether Conditions imposed as to Sewage Drain unreasonable—Municipal Corporations Act, 1933, s. 33 (4)—Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), s. 5.

Statute—Interpretation—Statute not open to Test of Reasonableness—Right of Appeal from Local Authority to Statutory Board—Test applicable to Council's Administration.

Section 5 (1) of the Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), provides as follows:—

"The Council may, in consenting to any subdivision of land under section three hundred and thirty-two of the Municipal Corporations Act, 1933, impose such conditions as to the construction by the owners of the land of all public and private drains for the disposal of sewage and storm-water from the said land as the Council thinks fit."

The Council sought to impose as a condition of its consent to a subdivision of the defendant's land fronting a public road that he pay half the cost of a sewer-drain extension along that road for a distance of 534 ft., at a cost of from £130 to £150. The defendant appealed under s. 332 (3) of the Municipal Corporations Act, 1933, and under s. 5 of the Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), against the decision of the Council to impose that condition. The appeal was heard by the statutory Board appointed *ad hoc* by the Governor-General under s. 332 of the Municipal Corporations Act, 1933, which allowed his appeal on the ground that, as the power conferred by s. 5 (1) of the Empowering Act, 1941, to impose conditions on owners of land as to the construction of "public drains" was inoperative in the absence of the power to compel the owner to construct a public-sewage drain, the condition imposed was *ultra vires*; and, even if there were such a power, it was unreasonable to compel him to contribute to the construction of a public-sewage drain which would be used for carrying sewage from other lands as well as his own: reported *Ante*, p. 15.

On motions for mandamus to command the members of the Board to hear and determine on its merits the said appeal, and of certiorari for the purpose of removing into the Supreme Court the Board's decision,

Held, 1. That s. 5 (1) of the Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), does not call for an interpretation by the Supreme Court that limits its scope by reason of the fact that its exercise interferes with the rights of ownership; and it cannot be submitted, as a by-law can, to the test of reasonableness.

2. That, by virtue of s. 5 (2) of the statute, the right of appeal given to the person aggrieved by the imposition by the Council of a condition renders administration under s. 5 liable to the test of reasonableness having regard to the obligations of the Council and the rights of the appellant, in each case a question of fact; and the question of *ultra vires* does not arise.

3. That, as the Board had before it all relevant evidence available upon which to reach the decision complained of, the conclusion must be accepted as a *bona fide* answer to the question before the Board.

Consequently, there was no material upon which to order mandamus or certiorari; but this decision did not amount to a declaration that the defendant was entitled to have the plan of the subdivision approved and registered, or give any expression of opinion as to the effect of the Board's decision, or whether or not the Council had to approve the plan without drainage conditions of any kind.

MOTIONS for writ of mandamus to command the members of a Board constituted under s. 332 of the Municipal Corporations Act, 1933, to hear and determine on its merits an appeal by one Martin against a decision of the plaintiff Corporation, reported *Ante*, p. 15, and
5 for an order vacating the decision of the Board therein; and, alternatively, for an order that a writ of certiorari do issue to the members of the said Board for the purpose of removing into the Supreme Court the decision of the said Board.

The surveyor for the second defendant, Charles Martin, the owner
10 of some 3 acres of land with a frontage to the Western Hutt Road, on April 10, 1945, applied to the plaintiff Council for its approval of a subdivisional plan showing two lots containing approximately 21½ perches. Each lot had a frontage to the road. The Works Drainage and Town-planning Committee of the Council on May 7 agreed to consider favour-
15 ably the application conditional on an undertaking by Martin to provide half the cost of necessary drainage extension.

On May 14, the Council's Town Clerk wrote to the surveyor advising him the Town-planning Committee had recommended the Council to approve the proposal subject to the condition that Martin pay half
20 the cost of the drainage extension necessary, and added: "I would be glad to have your acceptance of these terms." Martin's solicitors then wrote requesting the Committee to consider the condition that

Martin should pay half the cost of the drainage extension to his property, and on June 5 the Committee resolved—

to advise them of Council's powers under the 1941 Empowering Act concerning the construction of sewage and storm-water drainage by subdividing owners, and to suggest that some approach could be made to owners of the adjacent lands benefiting by such extension with a view to a proportionate contribution of the total cost of the work.

Martin's solicitors again wrote to the Committee requesting that further consideration be given to the matter by the Committee, and on July 2, 1945, the Committee, after discussion, resolved to adhere "to the previous decision of the Council in this matter."

Martin objected to the imposition of this condition, and exercised the right of appeal given to him under s. 332 of the Municipal Corporations Act, 1933, and s. 5 of the Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), to a duly constituted Board comprised of the above-mentioned first defendants. From the statement of facts agreed upon, it appeared:

1. The existing sewer main reached a point approximately 534 ft. from the southern boundary of the northern lot of the subdivision.
2. The Council therefore required the appellant to pay half the cost of a drainage extension 534 ft. in length along the Western Hutt Road, which was a public street.
3. The estimated amount of such half-cost was between £130 and £150.
4. The appellant paid rates for the land comprised in the said subdivision, together with adjoining land, to the Lower Hutt City Corporation, the amount for the current year being £33 7s. 6d.

Of the rates payable by Martin, some £5 per annum was assessed in relation to interest and provision for a sinking fund on certain drainage loans.

The subdivisional plan before the Board showed the line of the drainage extension required.

The decision of the Board, which consisted of Mr. A. M. Goulding, Stipendiary Magistrate, Chairman, Mr. Dale, Solicitor, and Mr. Mahony, Civil Engineer, who are named in the present proceedings as the first defendants, was delivered in writing.

The Board allowed the appeal, awarded Martin (second defendant here) £8 8s. costs against the Council, and ordered each party to pay the fee for its nominated member of the Board *Ante*, p. 15.

In its statement of claim, the plaintiff Corporation alleged that the decision of the Board was patently erroneous in law, and the Board wrongly refused to determine the appeal before it on its merits. It therefore prayed—

1. (a) That a writ of mandamus be issued commanding the above-mentioned first defendants as and being members of the said Board to hear and determine the said appeal on its merits.

(b) For an order vacating the decision of the said Board made on December 12, 1945.

2. (a) That a writ of certiorari be issued addressed to the above-mentioned first defendants for the purpose of removing into this honourable Court the decision made on December 12, 1945, by the above-mentioned first defendants as members of the said Board in order that the said decision may be quashed.

(b) For an order that the said decision be quashed on the return of the writ of certiorari without further order.

3. The costs of and incidental to these proceedings.

Biss, for the plaintiff Corporation. The Board's decision was based on the ground that the condition imposed by the plaintiff's Council was *ultra vires*. The question of reasonableness was not considered on its merits; and in so far as it was mentioned in the decision of the Board it was merely *obiter*. The condition imposed was *intra vires* the Council and was a reasonable one: *Flower v. Ebbw Vale Steel, Iron, and Coal Co., Ltd.*(1), *Akel v. Clark*(2), *Stibbe v. Stibbe*(3), and *Sharp v. Wakefield*(4).

Kennard, for the defendant, Martin. The Court will not question by mandamus the honest decision of a tribunal in matters within its jurisdiction; and, on any ground, mandamus will not lie here: 9 *Halsbury's Laws of England*, 2nd Ed. 767, para. 1300, *High on Legal Remedies*, 25, *Smith v. Chorley Rural Council*(5), *Plimmer v. Wellington Harbour Board*(6), *Colonial Bank of Australia v. Willan*(7), *Simmons v. Commissioner of Stamp Duties*(8), *The Queen v. Monmouth Corporation*(9), *Easson v. Ward*(10), and *In re Roche*(11).

The matter was within the Board's jurisdiction, and cannot be examined by certiorari proceedings: *Sykes v. Atkin*(12).

Biss, in reply.

Cur. adv. vult.

JOHNSTON, J. [After stating the facts, as above:] The matter now comes before this Court on motions for writs of mandamus or certiorari on the grounds of error in law and refusal to determine the appeal on its merits as set out in the prayer in the statement of claim.

At the hearing before the Board it was contended that the Board's condition that Martin pay half the cost of the proposed drainage extension was—

- (a) *Ultra vires* the powers of the Council.
- (b) Unfair and unreasonable, in that (1) he should not be required to pay any part of the cost of the drainage extension along a public street; (2) he should not be required to pay any part of the cost which should properly be born by the ratepayers as a whole, and (3) the conditions required Martin to make provision for the disposal of sewage from land other than the owner's land.

For the Council, it was contended that the condition was *intra vires*, was fair and reasonable, and in the interest of the ratepayers generally.

The judgment of the Board deals with both main propositions. On the contention that the condition is *ultra vires* the Council, it came to the conclusion that the Council had no power to compel an owner to construct a public drain. As an abstract proposition, this bare conclusion may be admitted, but there are many conditions undisputably valid an owner cannot be compelled to carry out, and it does not answer the question what are the terms as to drainage the Council is empowered by statute to impose as a condition of granting approval to a subdivision of property within its jurisdiction. The answer is such as it thinks fit but subject to appeal to a special tribunal. Section 5 (1)

(1) [1934] 2 K.B. 132.

(2) [1940] N.Z.L.R. 147.

(3) [1931] P. 105.

(4) [1891] A.C. 173.

(5) [1897] 1 Q.B. 678.

(6) (1887) 7 N.Z.L.R. 264.

(7) (1874) 5 L.R. P.C. 417.

(8) [1942] N.Z.L.R. 330.

(9) (1870) L.R. 5 Q.B. 251.

(10) (1904) 7 G.L.R. 398.

(11) (1888) 7 N.Z.L.R. 206.

(12) [1942] N.Z.L.R. 63.

of the Lower Hutt City Empowering and Rates Consolidation Act, 1941 (Local), is as follows :—

The Council may, in consenting to any subdivision of land under section three hundred and thirty-two of the Municipal Corporations Act, 1933, impose such conditions as to the construction by the owners of the land of all public and private drains for the disposal of sewage and storm-water from the said land as the Council thinks fit.

The language, in my opinion, can bear only one meaning, and that is that, before consenting to a subdivision of land within its jurisdiction, the Council may impose on the owner seeking its consent such conditions for the construction of all public and private drains for the disposal of sewage and storm-water as the Council thinks fit. This statutory power, wide as it is because the requirements of drainage may vary according to the situation and individual characteristics of each subdivision, given to a civic body responsible for the sanitary condition of its domain, does not call for an interpretation by this Court that limits its scope by reason of the fact that its exercise interferes with the rights of ownership. *Prima facie* the section cannot be submitted, as a by-law can, to the test of reasonableness, and a *bona fide* exercise of the power cannot be challenged on the ground of *ultra vires*, or undue interference with private rights. There must be many cases in which a suburban subdivision cannot be approved without provision for proper drainage, and where the Council is not justified in incurring the expense of extending its drains to provide that drainage. In such case, some other method of drainage must be sought, and it is not unreasonable to suppose a solution of the difficulty may be found in each party contributing to the cost. It is within the power of a Council to enter into such agreements, and if Martin, thinking good drainage would enhance the value of his allotment, had agreed to contribute as suggested, it would have been a valid agreement. While private rights must give way to civic need, especially in relation to drainage for sewage as distinct from the construction of streets where the requirements are standardized, yet they are not ignored. A right of appeal is given by subs. 2 of s. 5 of the 1941 Act if the applicant is aggrieved by the imposition of a condition. Thereby administration under s. 5, not s. 5 itself, becomes liable to the test of reasonableness. The question of *ultra vires* does not arise.

The Board to hear the appeal is appointed by the Governor-General, and consists of a Magistrate, a nominee of the Council, and a nominee of the aggrieved applicant. For it, the question is whether the condition appealed for is reasonable having regard to the obligations of the Council and the rights of an aggrieved owner. In each case it is a question of fact. If the condition is such that the applicant has no right to perform it, it is obviously unreasonable if other arrangements not prejudicial to the civic interest are possible.

In this case, there is nothing to prevent the applicant, Martin, performing the condition imposed, which consists of a money contribution, if he wants to. The sole question is whether it is reasonable he should be asked to contribute to the extent demanded or whether the Council should not agree to some less expensive but sufficiently satisfactory measure of drainage. In the case of an appeal against refusal to approve a subdivision, the appeal Board can approve a substituted plan of subdivision, but no such power seems given the Board in regard to drainage, and no alternative method was in this case submitted to the Board.

The plaintiff Council contends the Board's decision rested solely on the ground that the condition was *ultra vires*, and the question of reasonableness was not considered on its merits, and, so far as the Board, expressed its opinion on this question, it was *obiter*. But the judgment, after declaring in its opinion the condition was *ultra vires*, proceeded :

There appears yet another reason why the condition is bad. The subsection in question empowers the Council to impose conditions as to the construction of "drains for the disposal of sewage . . . from the said land." In our view, it is unreasonable even if there were power to compel Martin to contribute to the construction of 534 ft. of public-sewage drain when the drain would obviously be used for carrying sewage from other lands as well as his.

The appeal is allowed and the Board awards the appellant £8 8s. costs against the respondent Council—each party to pay the fee of its nominated member of the Board which is fixed at £5 5s.(1).

I cannot regard this as *obiter* only. It is in terms the Board's answer to the question it was set up to answer. There is no suggestion the Board had not before it all relevant evidence available upon which to reach their answer. In my opinion, considering the Council had a representative on the Board, and the fact that the Council itself advised that Martin should canvass other owners for contributions, more detailed reasons were not essential, and the conclusion must be accepted as a *bona fide* answer to the question before the Board. Upholding the Board's decision does not amount to a declaration that the defendant is entitled to have the plan approved and registered. I express no opinion on the effect of the Board's decision or whether or not the Council must now approve the plan without drainage conditions of any kind. Those questions are not before me, and may be the subject of further proceedings.

The motions are dismissed and judgment in the action given for defendants with costs and disbursements.

Motions dismissed.

Solicitors for the plaintiff: *Bunny and Gillespie* (Wellington).

Solicitors for the defendants: *Luckie, Wren, and Kennard* (Wellington).

(1) *ante*, 15, 18.

[IN THE MAGISTRATES' COURT.]

TRANSPORT DEPARTMENT *v.* TROUT.

1946. July 13, August 9, before Mr. A. M. GOULDING, S.M., at Levin.

Motor-vehicles—Motor-driver's License—Holder of License issued by one Local Authority obtaining another License from another Local Authority—Whether an Offence—Motor-vehicles Act, 1924, s. 21 (1).

Section 21 of the Motor-vehicles Act, 1924, aims at preventing the issue of motor-driver's licenses by different local authorities when a motorist already has a license; but it does not declare that obtaining such a license while holding another motor-driver's license is an offence, and it prescribes no penalty.

Police v. Mahoney (No. 2) ((1945) 4 M.C.D. 175) applied.

INFORMATION charging the defendant with obtaining a driver's license from the Wellington City Council while still the holder of a driver's license obtained from the Levin Borough Council, in breach of s. 21 (1) of the Motor-vehicles Act, 1924.

It appeared that the defendant was, in fact, the holder of a car-driver's license which he obtained from the Levin Borough Council on September 6, 1945. He was anxious to obtain a truck-driver's license, but the Transport Officers in the Levin District required him to go through a test before they would issue him with one. The defendant apparently felt that this was unreasonable, he being an experienced army driver. He then approached the Wellington City Council and he was issued with both a car-driver's license and a heavy-vehicle license.

Inspector Peters, for the Transport Department.

N. Thomson, for the defendant.

Cur. adv. vult.

GOULDING, S.M. Section 21 (1) of the Motor-vehicles Act is as follows:—

“21. (1) Any local authority may, on payment of a fee of five shillings, issue a motor-driver's license to any person, not being in any case under the age of fifteen years, who satisfies the local authority that he is qualified to be the holder of a motor-driver's license. The holder of a motor-driver's license shall not be qualified to obtain another such license while the license so held by him is in force.”

The section does not declare that it is an offence to obtain a motor-driver's license whilst holding another motor-driver's license. The Inspector relied upon s. 22 (5) in support of his contentions that it was an offence. Section 22 has, in my opinion, no bearing on the question. That section empowers the Court to endorse licenses or impose disqualification when persons are convicted of offences under the Act. Sub-section (5) of the section makes it an offence when such disqualification is in existence to apply for or obtain a license in face of the disqualification.

I agree with Mr. *Thomson* that since the legislation has failed to create an offence under s. 21 the present prosecution cannot succeed. I have no doubt that it was intended to create an offence, but the section has not done so. I adopt the views expressed by *Paterson*, S.M., in *Police v. Mahoney* (No. 2) ((1945) 4 M.C.D. 175.), which was a prosecution under the Printers and Newspapers Registration Act, 1908, Mr. *Paterson* had occasion to consider whether a certain section made it an offence not to deposit certain affidavits with the Registrar of the Supreme Court in connection with a change of name of the printer and publisher of a newspaper. The learned Magistrate says, after setting out the section: “This section, it will be noted, prescribes the formalities to be carried out where a person desires to publish a newspaper or where any change is made in any registered newspaper. It prescribes a positive duty “and contains no prohibition or sanction for its enforcement.”

That appears to me to be the position here. The section aims at preventing the issue of licenses by different local authorities when a

motorist has already got a license, but it does not declare that obtaining such a license is an offence, nor does it prescribe any penalty.

Nor can I find in the Act any section such as one commonly finds, which declares that the breach of any provision of this Act, shall constitute an offence.

I therefore dismiss the information.

Information dismissed.

Solicitors for the defendant : *Harper, Atmore, and Thomson* (Levin).

[IN THE COMPENSATION COURT.]

SMITH v. UNION STEAM SHIP COMPANY OF
NEW ZEALAND, LIMITED.

COMPENSATION COURT. Auckland. 1945. October 25, December 12.
ONGLEY, J.

Workers' Compensation—Liability for Compensation—Order ending Weekly Payments without Qualification—Subsequent Claim for Compensation for Termination of Payments—Whether such Action maintainable—Workers' Compensation Act, 1922, s. 29.

An order, by consent made without qualification by the Court under s. 29 of the Workers' Compensation Act, 1922, terminating "the weekly payments of compensation heretofore payable" in respect of an accident, covers all incapacity resulting from such accident, including a fresh type of disability arising out of that accident but developing subsequently to the order.

Nicholson v. Piper(1) and *Logie v. Union Steam Ship Co., Ltd.*(2), referred to.

(1) [1907] A.C. 215, 220; 9 W.C.C. 123.

(2) [1945] N.Z.L.R. 388.

ACTION claiming compensation under the Workers' Compensation Act, 1922, in respect of an accident arising out of and in the course of the plaintiff's employment on March 20, 1945.

On March 20, 1945, plaintiff was injured by accident arising out of
5 and in the course of his employment with defendant company and was put on compensation. On April 27, 1945, the defendant company filed an application under s. 29 of the Workers' Compensation Act, 1922, for an order "reviewing an agreement for weekly compensation hitherto
"subsisting between the Union Steam Ship Company of New Zealand,
10 "Limited, and the above-named, A. J. Smith." The application came on for hearing before O'Regan, J., on May 15, 1945. His Honour minuted the application as follows:—

Settled by agreement of counsel on payment of compensation at £4 10s. per
15 week as from the date of the accident till Wednesday, the 9th May, plus medical expenses £1, costs £2 2s.

An order was then sealed as follows:—

Upon reading the notice of motion filed herein on the 27th day of April, 1945,
and the affidavit of Robert Elder Watson filed in support thereof and upon hearing
Mr. C. A. Hamer of counsel for the above-named applicant Union Steam Ship
20 Company of New Zealand Limited and Mr. A. M. Finlay of counsel for the above-named respondent A. J. Smith: By consent it is ordered by the Court that the

weekly payments of compensation heretofore payable by the applicant to the respondent be terminated upon the payment by the applicant to the respondent of compensation at the rate of £4 10s. per week from the date of his accident—namely, the 20th day of March, 1945, to the 9th day of May, 1945—and the further sum of £1 for medical expenses: And it is further ordered that the applicant do pay to the respondent the sum of £2 2s. for costs.

The motion, the affidavit in support, and the order were intituled “In the matter of section 29 of the Workers’ Compensation Act, 1922.” The application was an application under s. 29 of the Act and not an application under s. 62 of the Statutes Amendment Act, 1938, and the order likewise an order under s. 29 and not under s. 62.

On September 11, 1945, plaintiff issued a writ claiming compensation in respect of the accident of March 20, 1945. The basis of the claim was that plaintiff developed sciatica very shortly after the making of the order terminating compensation.

A. M. Finlay, for the plaintiff. The proposition stated in *Macdonald’s Workers’ Compensation in New Zealand*, 2nd Ed. 453, para. 906, goes too far as regards the ceasing of the employer’s liability, in view of s. 29 of the Workers’ Compensation Act, 1922. *Nicholson v. Piper*(1) and *Williams v. Crawshaw Bros. (Cyfathfa), Ltd.*(2), are distinguishable, as a different kind of disability might spring from the same source, and give a right to compensation even though payments in respect of the first disability may have been correctly terminated, as here. The order made by consent of the parties and the matter sought to be proved in the present claim were not in issue or before the Court at any time; consequently, the order is not *res judicata*: *13 Halsbury’s Laws of England*, 2nd Ed. 443, para. 498.

Hamer, for the defendant company. The order was made in terms of s. 29 of the Workers’ Compensation Act, 1922; it was not made under s. 62 of the Statutes Amendment Act, 1938; and, as it was made without qualification, it was an ending of the claim: *Macdonald’s Workers’ Compensation in New Zealand*, 2nd Ed. 453, para. 906, and *Nicholson v. Piper*(3). The order is an order of a Court of competent jurisdiction within s. 62 (1) (d); but it is not an order of the kind contemplated by s. 62 (3); and there was no qualification, such as suspension, as could have been made under s. 29 of the principal Act: *Macdonald’s Workers’ Compensation in New Zealand*, 2nd Ed. 430, 431, para. 854 (a) (b). Plaintiff consented to the jurisdiction to make the order under s. 29, and acquiesced in the proceedings: *Logie v. Union Steam Ship Co., Ltd.*(4), does not apply; and plaintiff is debarred from making his present claim as it arises out of the same cause of action: *13 Halsbury’s Laws of England*, 2nd Ed. 408, paras. 463–65. An employer is not bound to pay compensation by weekly payments, or at all; and it is then a matter for the person claiming compensation to bring his action. Payment of compensation in the circumstances of *Logie’s* case is not automatic as there may have been disabling conditions, such as misconduct or absence from the work: *Bowley v. W. Booth and Co., Ltd.*(5).

Finlay, in reply. The motion filed by the defendant was not designed to end payments, but to put an end to the agreement between the plaintiff and the defendant company, thus distinguishing *Nicholson v. Piper*(6). When the order was made the plaintiff appeared to be well

(1) [1907] A.C. 215, 220; 9 W.C.C.

123, 131.

(2) (1929) 22 B.W.C.C. 223, 230.

(3) [1907] A.C. 215, 217, 218; 9 W.C.C. 123, 128.

(4) [1945] N.Z.L.R. 388.

(5) [1918] N.Z.L.R. 77.

(6) [1907] A.C. 215; 9 W.C.C. 123.

on the way to recovery: *Macdonald's Workers' Compensation in New Zealand*, 2nd Ed. 431, para. 854 (b).

Cur. adv. vult.

5 ONGLEY, J. The initial question for the Court is whether the order of May 15, 1945, terminating the liability for compensation in respect of the accident, bars the present claim.

10 The case for the plaintiff is that a fresh type of disability developed after the termination of payments by the Court, and that a claim for that fresh type of disability is not barred by the order. In support of his contention plaintiff's counsel submits that the statement in *Macdonald's Workers' Compensation in New Zealand*, 2nd Ed. 453, para. 906, goes too far in that it says the liability of the employer ceases. The paragraph is as follows:—

15 906. *Ending of payments.*—If the Court makes an order ending the weekly payments without qualification, the liability of the employer ceases and a subsequent application to review by the worker cannot be entertained.

He also points out that *Nicholson v. Piper*(1) is the main case on which that statement is based, and that it is a decision under the Imperial Act which differs from s. 29 of our Act in that the Imperial Act contains no
20 express power to suspend payment altogether and that in *Nicholson's* case the application failed because it was an application for review and increase of weekly payment, but, the weekly payment having been ended by an award, there was nothing to review or increase. He accordingly submits that *Nicholson v. Piper* is not in point, and that
25 this Court can disregard the order of May 15, 1945, terminating payment, because the disability now claimed for is a fresh type of disability and is not the type of disability in respect of which the order was made. The point for the Court is whether the payment terminated by the order was for all incapacity resulting from the accident, or only for incapacity
30 resulting from a particular type of disability from the accident—i.e., whether the order was in effect limited so as not to include a fresh type of disability subsequently developing, in this case sciatica. I have accordingly to interpret the order.

The order is a consent order by which “it is ordered that the weekly
35 “payments heretofore payable by the applicant to the respondent be “terminated.” What then were “the weekly payments heretofore “payable” because whatever they were they were terminated by the order? Section 5 (1) of the Workers' Compensation Act, 1922, is the section by which provision is made for payment of compensation to a
40 worker, and in regard to weekly payment it provides that where incapacity results from the injury the compensation payable shall be a weekly payment during the period of his incapacity. That is what the plaintiff was entitled to by statute at the date of the order, unless his rights had been in some way lessened or limited. It is not suggested
45 that his rights had been lessened or limited either by the agreement on which the terminating order was based or in any other way. It appears, therefore, that at the date of the order plaintiff was entitled to a weekly payment of compensation during the period of incapacity resulting from the injury regardless of whether the incapacity resulted by way of sciatica
50 or otherwise, provided it resulted from the injury, and that plaintiff had been entitled to that weekly payment from the date of the incapacity resulting from the injury. It is that weekly payment or the right to that weekly payment that the order refers to as “the weekly

(1) [1907] A.C. 215; 9 W.C.C. 123.

"payments of compensation heretofore payable," and it is those weekly payments that the order terminated—i.e., the weekly payments the plaintiff was entitled to during the period of his incapacity resulting from the accident. There is nothing on which I can hold that incapacity of a different type developing after the order was excluded from the order, and I must hold that the order of May 15, 1945, covers all incapacity resulting from the accident of March 20, 1945. 5

It was suggested during the argument that in view of *Logie v. Union Steam Ship Co., Ltd.* (2), there was not in this case an agreement giving the Court jurisdiction to make the order terminating payments (3). 10 I have accordingly considered whether I can treat the present action as including an application to set aside the order and can amend the claim by adding a prayer that the order be set aside. If that could be done, I am still without any grounds or evidence on which I could set the order aside. I accordingly hold that the order of this Court of 15 May 15, 1945, terminating payment of compensation in respect of the accident of March 20, 1945, bars this action.

In view of the opinion I have formed on this initial point, I have not considered the other matters involved in the action. It may be that proceedings will be taken to set aside the order of May 15, 1945, and so 20 permit the matters in dispute to be dealt with on the facts. I express no opinion on whether the order can or cannot be set aside. Judgment for defendant. Leave reserved for defendant to apply for costs.

Judgment for the defendant.

Solicitor for the plaintiff: *A. M. Finlay* (Auckland).

Solicitors for the defendant: *Russell, McVeagh, and Co.* (Auckland).

(2) [1945] N.Z.L.R. 388.

(3) *Ibid.*, 396, 397.

[IN THE MAGISTRATES' COURT.]

UPPER HUTT BOROUGH *v.* MAYFAIR THEATRE
COMPANY, LIMITED.

1946. August 30, October 25, before Mr. A. M. GOULDING, S.M., at Upper Hutt.

Municipal Corporation—Rubbish Removal—Debit Notes sent to Trade Occupiers for Charge for Collection-service—Whether a "Rate"—Proper Method of Recovery—Penalty for Late Payment—Municipal Corporations Act, 1933, ss. 90, 99—Rating Act, 1925, ss. 61, 88.

The Borough undertook the removal of rubbish and refuse from various trade premises, and fixed the charges for such collection and removal. The occupiers concerned were debited with the particular charge against them in the Council's debit note-book, and debit notes were sent to the defendant company, among other occupiers. Later, the Borough solicitors sent a letter of demand to the company for the sum due for collection.

Held. That the charge had been made under s. 90 (2) of the Municipal Corporations Act, 1933; and as, by virtue of s. 90 (3), it was

deemed to be a separate rate, it should accordingly have been demanded and recovered in the manner prescribed by s. 61 of the Rating Act, 1925.

Semble, Such a charge may be the subject of the penalty which may be imposed in respect of non-payment of rates and special charge by the Rating Act, 1925.

ACTION in which, by its statement of claim, the plaintiff Borough sued the defendant and claimed to recover the sum of £4, being the amount due and owing by the defendant to the plaintiff for services supplied—namely, rubbish removal—particulars whereof had been supplied to the defendant. The plaintiff merely claimed £4, and requested the issue of a summons. A number of similar claims against different persons—some owners, and some both owners and occupiers, of different premises in the borough—had been issued through the Court, and it was agreed that the decision in one case would determine whether all or any of the claims could succeed.

The Council undertook through contractors the removal of rubbish and refuse from various trade premises. On July 11, 1945, the Council's Public Services Committee recommended the imposition of a charge of £2 per annum against certain trade occupiers and £1 against other trade occupiers, and compiled a list fixing the charge for each particular occupier. The names of the defendant and the others against whom claims are now made were upon that list. That resolution was confirmed by the Council on July 18, 1945. A circular was prepared and sent advising occupiers of the days of the week when rubbish collection would be made.

The various occupiers were debited with the particular charge against them in the Council's debit-note book, and debit-notes were duly sent to each of the defendants against whom claims were now made. The amounts debited not having been paid, the Council's solicitor wrote to the defendant and others on June 4, 1946, informing them that, unless the particular sum due in each case was paid not later than fourteen days after receipt of the letter, proceedings would be taken for recovery of the amount. Hence the present claim.

The Town Clerk could not say whether or not the contractors had actually removed rubbish for the defendant. All he could say was that the service was available, and that, if rubbish was put out for collection, it should have been collected.

Parkin, for the plaintiff.

Macandrew, for the defendant.

Cur. adv. vult.

GOULDING, S.M. [After stating the facts, as above:] The defence raises the contention that the charge made by the Council is governed by s. 90 of the Municipal Corporations Act, 1933; and its recovery is governed by the provisions of the Rating Act, 1925; that the provisions of the latter Act with regard to recovery of rates have not been complied with; and that, therefore, the plaintiff cannot succeed. If this defence fails, it is agreed that parties are to be heard further upon the question as to whether the Council has in fact given service for the charge it claims.

Under s. 90 of the Municipal Corporations Act, 1933, where a Council contracts for the removal of refuse, it may in the first place levy a separate rate to cover the estimated expenditure. But, by subs. 2 of the same section, it is provided :—

“ In lieu of making and levying any such rate the Council may levy a uniform annual fee :

“ Provided that any such annual fee in respect of the cleansing of closets or privies may be a uniform annual fee for each pan in such closets or privies :

“ Provided further that in any case where, in the opinion of the Council, the refuse from any land or building is principally trade-refuse or is excessive in quantity the Council may, if it thinks fit, in lieu of levying such rate or levying such uniform annual fee, make a reasonable charge for the removal of such refuse, or may require the owner or occupier of the land or building to have the same removed regularly at his own cost, or, in addition to such rate or uniform annual fee, may make a reasonable charge for the removal of rubbish in excess of a prescribed amount.”

Subsection 3 provides :—

“ Every such annual fee and every such charge shall for all purposes be deemed to be a separate rate.”

I think that in the case before the Court the Council has acted under the second proviso to subs. 2 of the section. It has neither levied a uniform annual fee nor has it levied a separate rate. It has “ made a reasonable charge for removal of refuse,” that charge differing in amount for different owners or occupiers. The section does not speak of the charge as an annual charge, but I think that is what is intended. Thereupon subs. 3 comes into play and declares that the above charge is “ deemed to be a separate rate.”

I agree with the contention of counsel for the plaintiff that the effect of subs. 3 of s. 90 is to give the protection of a separate rate to charges imposed under s. 90 (2), and that the levies and charges which a council can impose thereunder need not be imposed with the formalities necessary for imposing rates as separate rates.

But does that justify the recovery of the charge otherwise than in the manner laid down by the Rating Act ? I do not think it does.

By s. 99 of the Municipal Corporations Act, 1933, the provisions of the Rating Act apply to all rates made under the Act.

While the charge fixed for collection of rates is not, I think, strictly speaking a rate, it is “ deemed to be a separate rate ” under s. 90 (3). If, as counsel for the plaintiff argues, and I agree with him, that gives the charge the same protection as a separate rate, it is difficult to escape the conclusion that it should be demanded and recovered in the manner laid down by the Rating Act. Section 61 of that Act prescribes that a demand for rates is to be made in the form set out as No. 8 in the First Schedule to the Act; or “ to the like effect.” An examination of the section and the form leads to the conclusion that the demand should purport to be signed by a person duly appointed to collect rates. The demand should also fix the time when the rate is payable and the place for payment.

The debit notes sent to the defendant and others in the cases now before the Court do not purport to be signed by any officer of the Council, nor do they fix any time or place for payment.

Section 65 of the Rating Act, 1925, provides that, if any person fails for fourteen days after demand to pay any rate, the local authority may recover it through the Court.

A consideration of the provisions in the Municipal Corporations Act, 1933, for the levying of separate rates and special charges also supports the view that such rates and charges are to be recovered in the manner provided by the Rating Act. With regard to water rates, s. 88 provides that all water rates or charges shall be deemed separate rates, and I think such rates and charges may be the subject of the penalty which can be imposed in respect of non-payment of rates under the Rating Act.

I therefore think that the plaintiff, the Council, cannot succeed in the present action for recovery of these charges, and it is unnecessary for me to hear counsel upon other matters raised.

Judgment for the defendant with costs.

Judgment for the defendant company.

Solicitors for the plaintiff borough : *Mazengarb, Hay, and Macalister* (Wellington).

Solicitors for the defendant company : *Fell, Putnam, and Macandrew* (Wellington).

[IN THE COURT OF APPEAL.]

MINISTER OF LANDS *v.* MAPERA MAKU ERIHANA.

COURT OF APPEAL. Wellington. 1947. March 19; April 3. SIR HUMPHREY O'LEARY, C.J.; SMITH, J.; FAIR, J.; CALLAN, J.

Rating—Systems of Rating—Swamp Drainage—Native Land in Drainage Area—Native Land classified as receiving or likely to receive Direct Benefit from Execution of Drainage Works—Native Owner not Appealing against Classification or Applying to Minister to amend Classification List—On failure of payment of Rates, Application made for Charging-order—Remission of Rates sought on Ground that Circumstances constituted "Special circumstances arising from "Hardship"—Whether Classification, if, in fact, in Wrong Class, could constitute "Hardship"—Discretion of Native Land Court as to what constitutes "Special circumstances"—Swamp Drainage Amendment Act, 1928, ss. 2, 3—Rating Act, 1925, s. 108 (3) (4) (6).

The Native Land Court, in considering an application for remission of rates under s. 108 (6) of the Rating Act, 1925, must accept the validity of the rate which it has power to remit, and the effect of the classification upon which the rate is based cannot constitute "special circumstances arising from "hardship" within the meaning of the subsection.

Attorney-General v. De Keyser's Royal Hotel, Ltd. (1), applied.

So held by the Court of Appeal, allowing an appeal from the judgment of *Finlay, J.* ([1946] N.Z.L.R. 356), by varying the answer made in the Court below to the question put in the originating summons, in the manner following: That the Native Land Court has no power under s. 108 (6) of the Rating Act, 1925, to remit any rates to the plaintiff upon the basis or finding by it that the benefit received by her land is other than that settled by an existing classification under the Swamp Drainage Act, 1915, as amended by the Swamp Drainage Amendment Act, 1928.

Julius v. Oxford (Bishop) (2) referred to.

Observations by *Fair and Callan, JJ.*, as to objection to the Supreme Court considering matters on originating summonses when specific facts relating to a particular class to be affected by it have not been put before it.

Appeal from the judgment of *Finlay, J.*, [1946] N.Z.L.R. 356, allowed and answer varied as above.

(1) [1920] A.C. 508.

(2) (1880) 5 App. Cas. 214.

APPEAL from the whole of the judgment or order of Mr. Justice Finlay, reported [1946] N.Z.L.R. 356, upon the ground that such judgment or order is erroneous in point of law.

The facts sufficiently appear from the judgment appealed from.

A. E. Currie, for the appellant. The question turns on the interpretation of s. 108 (6) of the Rating Act, 1925. The land is part of an area of Native land known as the Pukekawa Drainage area, which was classified for rating purposes in accordance with s. 3 of the Swamp Drainage Amendment Act, 1928; and s. 3 (4) gives the right of appeal to a Magistrate against the classification: *cf.* Land Drainage Act, 1908, s. 33; Land Drainage Amendment Act, 1913, s. 3; River Boards Amendment Act, 1913, s. 96; Soil Conservation and Rivers Control Act, 1941, ss. 101, 102; and the Water Supply Act, 1908, ss. 34, 35. Recovery of the rates in question is controlled by Part II of the Rating Act, 1925, and in particular by s. 108.

The Court below wrongly applied the term "hardship" as that word is used in s. 108 (6) of the Rating Act, 1925. A judicial discre-

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tion such as is conferred by s. 108 (6) is not to be used so as to defeat the exercise of discretion by another judicial or semi-judicial functionary acting within his powers. This is supported by two lines of authority. The first relates to the discretion of Justices as conferred in New Zealand by s. 92 of the Justices of the Peace Act, 1927, and by the corresponding section in English statutes : see *Banton v. Davies*(1), *Phillips v. Evans*(2), and *Nisbet v. Lloyd*(3). The second line of authority deals with the discretion of a superior Court as to costs.

A discretion cannot be exercised to override a jury's findings : *Harnett v. Vise*(4) and *Roberts v. Jones*(5).

[To CALLAN, J.] The form in which the question was put to the Court reserves the question of the classification of the land. The case was a hypothetical one for a declaration under the Declaratory Judgments Act, 1908. In this case, the amount of hypothesis is the minimum, as the land has been classified and the Native Land Court had been asked to make a charging-order for the rates. The only hypothetical matter was whether, in the opinion of the Native Land Court, the classification of the land was correct.

The principle for application here is as follows : Where there has been an appeal to a Magistrate, he has properly dealt with the matter, and, if he has acted in a manner unexceptionable to the Supreme Court, his decision is final, and there is no appeal. If any of the extraordinary remedies could come in on any error or lack of jurisdiction, those should have been used. If not, the ratepayer must be assumed to have accepted the Magistrate's judgment. It could not have been the intention of the Legislature that a Native ratepayer could ignore the statutory right of appeal given him by the Swamp Drainage Amendment Act, 1928, until a charging-order is applied for, and then be able to apply to the Native Land Court.

The words "special circumstances arising" govern both the words "hardship" and "indigency"; the terms are not identical, though they may overlap. Though the Native Land Court might find hardship notwithstanding a correct classification, it cannot find that a classification properly made is itself a hardship. A rating authority, rating on the annual value, has to budget at the beginning of each rating year, and, if the rating is to depend on the reopening of assessments on the ground of hardship when the ratepayer has not appealed to the Magistrate, the position of rating authorities will be rendered considerably more difficult. A construction of s. 108 (6) of the Rating Act, 1925, which will increase uncertainty as to rating by local authorities that have to budget in respect of their rates, is to be regarded as less desirable than one that avoids that consequence.

Bate, for the respondent. The judgment appealed from is right in so far as it answers the question posed by the originating summons, and the appeal should be dismissed. Only part of the question was answered, as argument was not addressed to the point as to lands receiving a partial benefit from the construction of drainage works, or a benefit less than other lands in the same classification, which may constitute hardship giving rise to special circumstances in which the Native Land Court may remit the rate wholly or in part.

(1) (1891) 17 Cox C.C. 469.
(2) [1896] 1 Q.B. 305.
(3) (1904) 68 J.P. 396.

(4) (1880) 5 Ex. D. 307.
(5) [1891] 2 Q.B. 194, 197.

In interpreting s. 108 (6) of the Rating Act, 1925, regard must be had to the general purpose of Part II of the Act—namely, to place Native land in a special class with reference to the enforcement of rates under the statute, which is a complete code in so far as rating is concerned. Section 112 of the Rating Act, 1925, expressly excludes those sections in Part I of the statute which enforce the payment of rates by the sale of the land, and only ss. 108 and 109 of the statute apply. The result is that Native lands may be sold for non-payment of rates only pursuant to the charging-orders and the further orders that the Native Land Court is empowered to make under ss. 108 and 109 of the Rating Act, 1925.

Section 112 should be interpreted in the light of the general purpose of the legislation to ensure as far as possible that Natives shall not be deprived of their land. Section 108 (6) is available with reference to all rates on Native land where charging-orders are applied for, but this dispensing power, though available in respect of all rates, has a special aptness to swamp-drainage rates. These rates are levied according to a classification, which can be, and generally is, made in anticipation of benefits from the proposed works. There can be a considerable margin of error in the assumptions on which the classification is made before the works are completed or have proved their worth. There is, therefore, scope for hardship if the results do not justify the assumptions. There is onus on the owner to prove hardship, and provision for an appeal.

As to the interpretation of s. 108 (6) with regard to the scope and purpose of the statute, see *Maxwell on Interpretation of Statutes*, 8th Ed. 241; and *Otago Harbour Board v. Mackintosh, Cayley, Phoenix, Ltd.*(6).

A classification once made is not final regarding Native land. If the rate can be remitted on any ground, it cannot be final; and, here, it may be remitted under the dispensing power on the ground of "hardship" or "indigency." The meaning of the phrase "hardship" or "indigency" was referred to by the learned Judge(7). Section 108 (5) refers to the Court being satisfied that the rates are payable. Consequently, hardship or indigency may be invoked only in respect of rates that are payable.

[SMITH, J. The respondent did not exercise his right of appeal to the Magistrate.]

It is a hardship to pay a rate for which no benefit or little benefit is obtained, and that the Native should have the second chance is consonant with the whole policy of the statute in relation to Native rates. A Native is personally liable for rates, as Part II of the Act does not relieve him from personal liability. If a Native's land is not made subject to a charging-order, but he is proceeded against personally or by distraint, he cannot invoke s. 108 (6), though he may apply under s. 74 (1) to the local body (here the Minister): *Prosser v. Makara County*(8).

The words "indigency" and "hardship" must be given their ordinary meaning: as to the word "indigency," see 3 *Words and Phrases*, 95; 5 *Oxford English Dictionary*, Pt. II, 212. In contrast is the word "hardship": see 5 *Oxford English Dictionary*, Pt. I, 90, which here refers to a rate that is unreasonably burdensome rendering it a hardship that it should be paid, irrespective of the particular Native's means.

(6) (1943) 4 N.Z.L.G.R. 306.

(7) [1946] N.Z.L.R. 356, 360, 361.

(8) (1942) 4 N.Z.L.G.R. 148.

Hardship is a matter of degree, and the word here is to be read disjunctively with the word "indigence." Therefore, a partial benefit to the land from the drainage works, if it is less than is received by other lands in the same classification, may amount to hardship. Section 108 (6) gives the Native Land Court power to remit the rate in whole or in part.

[SMITH, J. How does the failure to take advantage of a right to appeal amount to "special circumstances" within the meaning of subs. 6 ?].

10 The "special circumstances" arising from classification here, where a person is not indigent but has his land attached by a charging-order for rates which are burdensome, are that the land may be alienated from the Native for non-payment. The rates were levied when the demand was made under s. 108 (2)—*Minister of Lands v. Native*
15 *Trustee*(9)—and the words "so levied" in s. 108 (6) refer back to the rates which are the subject of a charging-order. Although there must be "special circumstances" arising from hardship before the Native Land Court can exercise its dispensing power, it is necessarily a question of fact in each case whether or not special circumstances exist:
20 see *Inspector of Mines v. Onakaka Iron and Steel Co., Ltd. (in Liquidation)* (No. 2)(10), and *Otago Harbour Board v. Mackintosh, Cayley, Phoenix, Ltd.*(11).

The appellant's argument as to the Native Land Court's exercising a discretion which would defeat the judgment of another judicial officer fails, in that the Native Land Court did not say the Magistrate would have given a different decision on appeal, or review his decision. If events falsified the Magistrate's conclusions, the Native Land Court has a discretionary power to reconsider them if special circumstances had arisen. The lines of cases cited for the appellant have little relevancy.

30 *A. E. Currie*, in reply. As to the alleged falsification of classification by subsequent results, see the Swamp Drainage Act, 1928, s. 3 (9) (10), which provides for amendment.

Cur. adv. vult.

O'LEARY, C.J. I have read the joint judgment of Mr. Justice Fair and Mr. Justice Callan(1). I agree with the conclusions arrived at by them.

I am of opinion that s. 3 of the Swamp Drainage Amendment Act, 1928, provides a code for the classification of the land to be rated, and, as was pointed out by counsel for the appellant, the provision is very
40 similar to the provisions of analogous Acts, such as the Land Drainage Act, 1908, the Water Supply Act, 1908, and the Soil Conservation and Rivers Control Act, 1941. Each of these has provisions which are in effect a code providing a basis for the levying of rates on the properties which are subject to their provisions.

45 Once it is accepted that there is a code, it would require an express and clear enactment to create an exception.

In this case, it was contended that the second clause of s. 108 (6) of the Rating Act, 1925, provided such an exception, but I am of opinion that that contention is unsound.

50 To invoke s. 108 (6) in the way suggested by respondent would, it seems to me, be such a derogation from the special terms of s. 3 as to be

(9) (1941) 4 N.Z.L.G.R. 31.
(10) [1943] N.Z.L.R. 720, 726.

(11) (1943) 4 N.Z.L.G.R. 306, 311, 323.
(1) *Post*, p. 170, l. 13.

altogether unjustified. It would be a review of the classification carried out under s. 3, whereas it seems that the only method of carrying out a review is that provided by the section itself.

I think that the appeal should be allowed, and that it be disposed of by the answer set out in the joint judgment.

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SMITH, J. This is an appeal from the judgment of Mr. Justice *Finlay*, which held, in effect, that, if it could be established before the Native Land Court, (a) that the respondent's land had been properly classified under one of the classifications established by s. 3 of the Swamp Drainage Amendment Act, 1928, as land likely to receive a benefit from drainage works to be undertaken in the Poukawa drainage area, and (b) that the land in question would, in fact, receive no benefit, the Native Land Court could hold, under s. 108 (6) of the Rating Act, 1925, that "special circumstances arising from hardship" had arisen which would enable that Court to remit the whole or any part of a rate levied upon the land pursuant to the classification. 10 15

Section 3 of the Swamp Drainage Amendment Act, 1928, makes special provisions for the classification of the lands liable to be rated under the Act. They are as follows:—

(i) The Minister of Lands may appoint a special tribunal, comprising one or more fit persons to examine and classify the lands.

(ii) After the classification is made, the Minister must give twenty-eight days' notice of the proportions which he proposes to appoint for the imposition of rates upon the several classes of land.

(iii) Before making the appointment, the Minister must consider all written objections received by him. 25

(iv) The Minister must then give public notice of the classification list made and signed by him and of the place where the list may be inspected for a period of twenty-one days.

(v) Any person aggrieved by the classification may appeal within seven days after the expiration of the twenty-one days to a Magistrate. 30

(vi) On the hearing of the appeal, the Magistrate may amend the classification list as he thinks reasonable. He must then sign the list as amended, and the determination of the Magistrate is final and conclusive.

(vii) For the purpose of any proceeding for the recovery of rates, every classification list signed by the Minister or by the Magistrate is declared by s. 3 (8) to be "sufficient evidence of a classification duly made in accordance with the requirements of this section." 35

Subsections 9 and 10 of s. 3 make special provision for subsequent amendment of the list. They provide that from time to time the classification list may be amended by the Minister, but that no such amendment shall have effect until the expiration of two months after service of the notice of amendment upon all ratepayers affected thereby. Each ratepayer affected has the same right of appeal to a Magistrate as he would have had on the making of the original classification list. 40 45

These provisions for classification are obviously special. They provide for the appointment of "one or more fit persons" to make the classification in the first instance, and then render the determination subject to appeal to a Magistrate. Once the list has been made in this way, the basis is established for calculating the amount of the rate which requires to be levied upon each class of land. 50

Section 4 (1) of the Swamp Drainage Amendment Act, 1928, provides that the provisions of the Rating Act, 1925, shall, so far as applic-

able, extend and apply to all rates levied under the authority of the Swamp Drainage Amendment Act in the same manner as if the Minister were a local authority and the drainage area a district within the meaning of the Rating Act.

5 Section 108 (6) of the Rating Act, 1925, which occurs in Part II of the Act relating especially to Native-land rating, provides as follows :—

10 The Court, in dealing with any claim for rates, may, in cases where it thinks it necessary or expedient, transfer the liability for such rates or any part thereof to any other land, and may grant a charge accordingly. In special circumstances arising from hardship or indigency the Court may remit the whole or any part of any rate so levied, and thereupon such rates, or so much thereof as shall be so remitted, shall be deemed to be discharged.

15 The question is whether the words "special circumstances arising from hardship" include the mere liability to pay a rate upon a block of Native land which has been duly classified as likely to receive a benefit when the fact is, if the Native Land Court had jurisdiction to make the inquiry, that the land does not receive any benefit, or only a less benefit than the other lands with which the block has been classified.

20 In the first place, the question concerns "special circumstances" arising from "hardship." The words "special circumstances" are wide and flexible, but, in my opinion, they do not here extend to the mere consequences of a duly made classification. The consequence of that failure is merely the general consequence of the classification—*viz.*, the liability to be rated in accordance with the classification list as signed by the Minister or by the Magistrate. In my opinion, that
25 consequence does not constitute "special circumstances," though it may constitute in a broad sense "hardship."

Secondly, I think that the Native Land Court has only jurisdiction under s. 108 (6) to consider "special circumstances" on the basis that
30 it has a valid rate before it. The power of the Court is "to remit" that rate. The "special circumstances" must be viewed in the light of the specific authority conferred by the subsection. In my opinion, the language used is not apt either to express or to imply that "special
35 "circumstances" can include the effect of the liability to be rated arising from the due classification of the lands upon which the rate itself is based.

Thirdly, I think that, when special power is given to one tribunal to classify lands for the purpose of making a rate, clear language is required to enable another tribunal or authority to investigate, the
40 correctness of that classification for the purpose of determining whether or not it is correct. That power is expressly given to the Minister, subject to appeal, by subss. 9 and 10 of s. 3, but, in my opinion, it is not given by s. 108 (6). That subsection is designed to authorize the Native Land Court to inquire into "special circumstances arising from
45 "hardship" for the purpose of determining whether a rate should be remitted, but it is not designed to confer upon the Court authority to make an investigation which is, by s. 3 of the Swamp Drainage Amendment Act, 1928, confided to a tribunal of special competence. This is, indeed, only another way of stating that the Native Land Court must
50 accept the validity of the rate which it has power to remit, and that the effect of the classification upon which the rate is based cannot constitute "special circumstances arising from hardship" within the subsection.

For these reasons, I think that the appeal should be allowed. The
55 answer proposed in the judgment of my brothers *Fair* and *Callan*(1) is

(1) *Post*, p. 170, l. 13.

sufficient to dispose of the appeal, and I agree with it. On the other hand, I think that the answer to the specific question asked in the originating summons is that the Native Land Court has no power under s. 108 (6) to remit any rates to the respondent upon the ground that the classification of her land under s. 3 of the Swamp Drainage Amendment Act, 1938, constituted "special circumstances arising from hard-ship" within s. 108 (6).

The respondent's remedy appears to be to apply to the Minister, who, as Mr. Currie submitted, would be under a duty to hear and consider the application and take any appropriate action: *Julius v. Oxford (Bishop)*(2).

The judgment of FAIR and CALLAN, JJ., was delivered by

FAIR, J. The circumstances which give rise to this litigation are sufficiently explained in the judgment of the learned Judge in the Court below, and it is not thought necessary to recite them in this judgment.

It seems desirable at the outset, before proceeding to a consideration of the appeal, to record that the question put in the originating summons is based upon an assumption that the Native Land Court has jurisdiction to determine whether the above-described land has not received, and is not likely to receive, any benefit from the construction of the drainage works for the cost and maintenance of which the rates in question are levied, and/or whether it has been wrongly classified for such rating. It appears to us that this is really the crux of the question that the Court has to decide, and that it is a question of law largely dependent upon the nature and purpose of the provisions of s. 3 of the Swamp Drainage Amendment Act, 1928. We have therefore considered the matter on that basis. For the reasons which we proceed to state, we are of opinion that the Native Land Court has no jurisdiction to enter upon or determine such questions, and that the appeal should be allowed.

It is first to be noted that the question whether the land receives no benefit from the work, or, although rated as receiving the highest benefit, receives less than that, is not only a question of fact, but a difficult question of fact. Upon these questions, different persons, although equally intelligent, expert, and reasonable, may honestly arrive at different conclusions. They are questions that ordinarily call for expert knowledge, skill, and good judgment on the part of the persons charged with their determination, or on the part of witnesses who aid such persons by their evidence. It appears clear from the provisions of s. 3 of the Swamp Drainage Amendment Act, 1928, that the determination of these difficult questions is in the first place entrusted to such persons as the Minister of Lands may appoint under s. 3 to make that classification.

The first classification having been made, the Minister has imposed upon him the duty of determining what proportion of the total rates each of the three classes of land has to bear. Before determining this, he has to give twenty-eight days' notice of the respective proportions he proposes to allot to each class, and, before apportioning them, to consider all written objections received by him within that period. Subsection 3 provides:—

Every classification so made shall be set forth in a list to be signed by the Minister, who shall immediately cause public notice of such classification to be given, and of the place where the classification list may be inspected for a period of twenty-one days (such place being the post-office in or nearest by the most con-

venient route to the drainage area), and of the right of appeal hereinafter conferred.

Subsection 4 provides :—

- 5 Any person aggrieved by such classification may appeal against the same on the ground that the land of the appellant or any other land in the drainage area has not been fairly classified in accordance with the benefit received or likely to be received from the construction of the works aforesaid, or has not been classified.

- 10 The notice of appeal has to be given within seven days after the expiration of twenty-one days and a copy lodged in the Head Office of the Lands Department, Wellington, within the same period. Appeals are heard by Magistrates, not less than fourteen days' notice being given the Minister and the appellant. It is provided by subs. 7 that the determination by the Magistrate shall be final and conclusive.

- 15 The appeal provided under subss. 4, 5, 6, and 7 safeguards the owners of the land against any erroneous classification by the officers appointed by the Minister. The Magistrate obviously constitutes an impartial tribunal qualified by his training and daily experience to determine such a controversy, and his decision on the questions is specifically made final and conclusive. There seems no reason for supposing that
20 either the persons appointed by the Minister in the first place to make the classification, or the Magistrate, will do other than honestly and competently carry out the duties entrusted to them. The procedure seems to provide amply sufficient protection to the owners of the lands affected against an unfair classification.

- 25 But there is a further protection available, which, although not designed to review the original classification, may probably be availed of in anomalous cases or proved mistake for that purpose, at least after the first year. Subsection 9 provides that the classification list may from time to time be amended by the Minister and the provisions relating
30 to appeals shall apply to every such amendment to the list. Although the provisions indicate that this primarily contemplates increasing the burden of rates, or possibly meeting a change in the physical circumstances affecting the land, it is available also to enable him to reduce the rates.

- 35 Clearly, this section was intended to provide a code for the classification of land for drainage rates, and *prima facie* there is the strongest presumption that such a method of review of the classification is the sole method by which it should be able to be altered or held inoperative. Somewhat similar provisions exist with regard to all rates, and the
40 conclusiveness of the rate-book upon a ratepayer not objecting to a valuation for rate purposes within a time allowed by the statute for that purpose is enacted for the same general purpose. All such provisions are intended to ensure stability in the finance of local bodies and security to the persons from whom they have borrowed large sums of money.

- 45 The general principle, that where a special method of procedure and a specific law is enacted it must be deemed to be intended to provide a code replacing existing general provisions, appears from the decision in *Attorney-General v. De Keyser's Royal Hotel, Ltd.*(1). It seems clear, therefore, that s. 3 is a code relating to classification for
50 drainage rates and, as we have said, provides in fact a comprehensive and exclusive code. If the Legislature had intended to make any exception to it, one would expect to find it clearly stated in the section itself. But there is not the slightest indication that Native lands were

(1) [1920] A.C. 508, 525, 538, 554, 570.

intended to be outside its scope, or that they were to have any special privileges in relation to this matter.

It is suggested that the second clause of s. 108 (6) of the Rating Act makes an exception in favour of the Native lands for special reasons. Reference was made during the argument to the generally accepted fact that the Maori people have not yet acquired, in general, business-like methods in the management of their money or lands to the same extent as the *pakeha*, and it was suggested that this may have been a reason for that subsection affording them a protection against their own weaknesses in this respect. As we have said, if that had been its intention, it would have been found as an exception to s. 3. The draftsman would, in drafting a code of this kind, one would think, have made such reference to the exception that was meant to be part of the code. This not having been done, the maxim *Generalia specialibus non derogant* applies with great force to s. 3.

Whether it is "hardship" within the meaning of s. 108 (6) of the Rating Act, 1925, to be compellable to pay rates for works from which no benefit is received; and, if so, whether it is "hardship" to be in that situation notwithstanding a failure to make use of means provided by the law for seeking extrication from that situation, are questions which do not here arise. They do not arise because it is not permissible, so long as the classification list remains in force, unamended, for the Native Land Court to entertain any suggestion that the respondent is in this situation. The classification list says she is not.

This does not mean that there may not be "hardship" proper for consideration by the Native Land Court even in respect to swamp-drainage rates. If a Native is in difficult circumstances, although not indigent in the sense of having no property, if his crop entirely fails, or if he suffers illness or incapacity and is unable to obtain male workers owing to epidemic, or has serious loss by exceptional floods or other disasters, these might well provide instances contemplated by the section.

This very discussion illustrates the objections to this Court considering matters on originating summonses when the specific facts relating to a particular class to be affected by it have not been put before it. In our view, the Supreme Court should not endeavour to answer general questions of this nature, or the interpretation of statutes, without the facts of at least one concrete case before it. It should be supplied with as many examples of the type of case to which the statute has been applied as can reasonably be furnished.

It results, in our view, that the appeal should be allowed by varying the answer made in the Court below to the questions put in the originating summons, and that the proper answer is that the Native Land Court has no power under s. 108 (6) of the Rating Act, 1925, to remit any rates to the plaintiff upon the basis or finding by it that the benefit received by her land is other than that settled by an existing classification under the Swamp Drainage Act.

Appeal allowed: answer in Court below varied.

Solicitors for the appellant: *Kennedy, Lusk, Willis, and Sproule* (Napier).

Solicitors for the respondent: *Simpson and Bate* (Hastings).

[IN THE MAGISTRATES' COURT.]

SHORTER v. TETLEY.

1946. December 10, 19, before Mr. J. H. LUXFORD, S.M., at Auckland.

Annual Holidays—Holidays taken in Two Periods—Statutory or Special Holidays to be excluded—Mandatory Provisions—Annual Holidays Act, 1944, ss. 3, 9 (1).

The provisions of the Annual Holidays Act, 1944, are mandatory, and cannot be varied by an agreement between an employer and his worker except so far as the statute specifically authorizes a variation; and any agreement which does not comply strictly with the provisions of the statute is, by virtue of s. 9 (1), void and of no effect, so far as it purports to take away from a worker anything to which the statute entitles him.

T., a factory proprietor, decided that all his employees should be given two holiday periods in each year—namely, from December 22, 1945, to January 6, 1946 (both days inclusive), and from April 19, 1946, to April 28, 1946 (both days inclusive). No objection was taken to this course by any employee; and the factory was closed down for the two periods. One M. worked in the factory from July 15, 1945, to May 15, 1946. On the termination of his employment on the latter day, he received no payment by way of holiday pay.

On a claim for a penalty based on an alleged breach by T. of the Annual Holidays Act, 1944, by not making a payment for annual holiday pay to M. on the termination of his employment,

Held, 1. That the effect of the proviso to s. 3 (3) of the Annual Holidays Act, 1944, is that (a) an annual holiday may be taken in two periods of one week each if the worker and the employer agree; and (b) an annual holiday of two weeks continuous or of two periods of one week each may be taken in advance before the worker has become entitled to the full annual holiday if the worker and his employer so agree.

2. That the word "week" where used in the Annual Holidays Act, 1944, means the worker's ordinary working-week; but the statutory holidays (four statutory or special holidays at Christmas, and two at Easter) were additional to the annual holiday period of the worker in question.

3. That the agreement between the defendant and M. was good so far as it related to the Christmas period (as it comprised six ordinary working-days, six non-working-days, and the four holidays of that period); but it was void as regards the Easter period, because it provided for less than one week's holiday—namely, four working-days, four non-working-days, and the two statutory holidays. There was therefore payable to M. on the termination of his employment a sum of £1 3s. 11d. for holiday pay; and a breach of the statute had accordingly been committed.

ACTION claiming a penalty based on an alleged breach by the defendant of the Annual Holidays Act, 1944.

The defendant was the proprietor of a factory in which leather goods were manufactured. A lad named McDonald had worked in the factory from July 15, 1945, to May 15, 1946. On the termination of his employment McDonald did not receive any payment by way of holiday pay. The defendant contended, however, that McDonald was given an annual holiday during the period of his employment, and that this must be taken into account in determining the amount of holiday pay due to him on the termination of his employment.

It appeared from the admitted facts that the defendant decided that all his employees should be given two holiday periods each year—namely, from December 22, 1945, to January 6, 1946 (both days inclusive), and from April 19, 1946, to April 28, 1946 (both days inclusive). He accordingly posted a notice on the door of the factory informing the staff that the annual holidays would be so taken. The notice set out the several dates just mentioned, and was posted up more than seven days prior to December 22, 1945. No objection was taken to this course by any employee.

Duggan, for the defendant.

Cur. adv. vult.

LUXFORD, S.M. The factory was closed down for the two periods, and, in the absence of any evidence to the contrary, I assume that McDonald did not attend the factory on any day on which it was closed.

The Annual Holidays Act, 1944, enacts that every worker is entitled at the end of each year of his employment to an annual holiday of two weeks on ordinary pay. Further, that the worker must be given his annual holiday within six months after he has become entitled to it (see s. 3 (1) (2)). A proviso, however, has been made to subs. (2)—namely:

“Provided that if the worker and the employer so agree the “holiday may be taken in two periods of one week each and the holiday or any such part thereof may be taken wholly or partly in “advance, before the worker has become entitled to the holiday as “aforesaid.”

The effect of the proviso is as follows: (a) an annual holiday may be taken in two periods of one week each if the worker and the employer so agree; (b) an annual holiday of two weeks continuous or of two periods of one week each may be taken in advance before the worker has become entitled to the full annual holiday if the worker and the employer so agree.

In order to prove an agreement between a worker and an employer, it is sufficient if a notice is posted in a conspicuous place setting out the employer's proposal and the employees act in accordance with the notice. In the present case, the proposal was set out clearly, and must be deemed to have been accepted by the conduct of the employees. Similarly, McDonald, by accepting the proposal, must be deemed to have agreed to take his annual holiday in advance.

The period of the Christmas holiday period was from December 22, 1945, to January 6, 1946 (both days inclusive). That period comprised six ordinary working-days, six non-working-days, and four statutory holidays. The period of the Easter holidays was from April 19 to April 28, both days inclusive. That period comprised four working-days, four non-working-days, and two statutory holidays.

The word "week," when used in the Act means the worker's ordinary working-week, which in the present case was five days. It will be noticed that in the Christmas holiday period there were four statutory or special holidays and in the Easter holiday period there were two. These, of course, are additional to the annual holiday period, by virtue of s. 3 (4).

The agreement between the workers and the defendant did not come within the provisions of the proviso to subs. (2) of s. 3, in that it purports to divide the holiday period into two periods of six days and four days.

In my opinion, the provisions of the Act are mandatory, and cannot be varied by agreement between an employer and his worker except so far as the statute specifically authorizes a variation. The only authorized variations are those relating to taking the annual holiday in two periods of one week each and the taking of the holiday in advance. Any agreement which does not comply strictly with the provisions of the Act is void and of no effect, so far as it purports to take away from a worker anything to which the Act entitles him. This is made clear by s. 9 (1), which provides that :

"No contract or agreement entered into before or after the commencement of this Act shall have any force or effect to deprive any worker of any right, power, privilege, or other benefit provided for by this Act."

There is nothing, however, to prevent an employer granting a longer annual holiday than that prescribed by the Act, or, if the holiday is to be taken in two periods, making one or both the periods to exceed one week. Consequently, the agreement relating to the Christmas period is good, but that relating to the Easter period is bad, because it provides for less than one week's holiday.

The result is that there was due to McDonald by way of holiday pay on the termination of his employment the sum of £1 3s. 11d. As this was not paid at the time of the termination, a breach of the Act was made. I propose, in the circumstances, to treat the breach as technical and impose a penalty of 1s.

Judgment for claimant accordingly.

Solicitor for the defendant : *H. R. Duggan* (Auckland).

WINTER v. HARVEY.

1947. February 12, 21, before Mr. S. L. PATERSON, S.M., at Huntly.

Motor-vehicles—Heavy Motor-vehicle—Owner of Bulldozer lending Vehicle and Employee to Post and Telegraph Department—Vehicle used under Departmental Control—Owner charged with Operating Vehicle on Highway without Permission of Controlling Road Authority—Heavy Motor-vehicle Regulations, 1940 (Serial No. 1940/78), Reg. 7.

The defendant was the owner of a bulldozer, and on the material date it was under contract to the Post and Telegraph Department, which had hired the bulldozer and driver, and had exclusive control over them.

The defendant was charged with a breach of Reg. 7 of the Heavy Motor-vehicles Regulations, 1940 (Serial No. 1940/78), in that he operated the bulldozer with a self-laying track with cleats or projections on a main highway on the material date, without first having obtained written permission from the controlling authority of the road.

The officers of the Post and Telegraph Department had kept the county officers informed of their activities so far as they were able, and had informed the county foreman, who was responsible for reporting the matter, that the Department would make good any damage on the road.

Held, dismissing the information with costs against the informant, That the defendant was not "operating" the bulldozer on the occasion as charged, and he had parted with its possession and control to the Post and Telegraph Department; and his employee, the driver, was subject to the orders and control of the Departmental officers, to whom the regulations did not apply while they were engaged in their duties.

Chare v. Hart (1918) 88 L.J.K.B. 833) referred to.

INFORMATION charging the defendant under Reg. 7 (1) of the Heavy Motor-vehicle Regulations, 1940 (Serial No. 1940/78), with operating a heavy motor-vehicle, to wit, a bulldozer fitted with a self-laying track with cleats or projections, on the Te Kauwhata-Waitakaruru Main Highway without first having obtained written permission from the controlling authority of the road.

The evidence showed that the defendant was the owner of a bulldozer. On November 18, 1946, he entered into a contract with an officer of the Post and Telegraph Department to hire the bulldozer to the Department together with a driver, and the bulldozer was delivered to the Department that day. Under this contract, the officers of the Post and Telegraph Department had exclusive control over the bulldozer and driver. The contract was made by the Post and Telegraph Department's foreman on the instructions of the overseer at Hamilton.

On November 19, the bulldozer was used at Te Kauwhata for the purpose, and in the course of, laying telegraph cables at the side of the road. It was driven by the defendant's employee but in all respects

under the direction and orders of the officers of the Post and Telegraph Department in charge of the work. The machine was carefully used but at times it went on to the bitumen surface of the road. This was unavoidable.

The Waikato County Council was the controlling authority over the road and responsible for the prosecution. The Post and Telegraph Department's overseer had tried during the previous day, and also on the morning of November 19, before the work was commenced, to get in touch with the county engineer or his assistant, but had not been able to do so. The Department's foreman had notified the county foreman that the work was to be done, and on the day before it commenced had gone over the route with him trying to locate pipes. The county foreman was present while the work was being done, and made no complaint. The Department's overseer, however, did inform him that, if any damage was done to the road, the Department would make it good.

Swarbrick, for the informant.

Chapman, for the defendant.

Cur. adv. vult.

PATERSON, S.M. [After stating the facts, as above:] In view of the facts, it is difficult to see why the County Council should prosecute the defendant. It was or should have been obvious to the county officers that the bulldozer was being used under the control and direction of the officers of the Post and Telegraph Department and not of the owner, and the overseer had expressly told the county foreman that the Department would be responsible for any damage. The defendant could not be said to "operate" the bulldozer. To "operate" is defined by Reg. 1 (3) as meaning :

"to use or drive or cause or permit to be used or driven or permit to be on any road whether the person operating is present in person or not."

As the defendant had parted with the possession and control of the machine, he cannot be brought within the comprehension of the regulation.

It is true that the machine was driven by the defendant's employee, but he was subject to the orders and control of the Departmental officers, and it was therefore they who were operating it. They were officers of the Crown, and, while engaged in their duties as such, the regulations do not apply to them, and they are not bound thereby, upon the well known principles now contained in s. 5 (k) of the Acts Interpretation Act, 1924, that the Crown is not bound by a statute unless expressly so provided. This principle also applies to statutory regulations and local body by-laws : see *Chare v. Hart* (1918) 88 L.J.K.B. 833, in which it was held that county by-laws did not apply to a civilian driver of a traction-engine hired by the Army Service Corps and used in the service of the Crown. It would be a Gilbertian situation if the persons who were responsible for the machine being operated on the road were exempt while the innocent owner was subject to a penalty.

As the officers of the Post and Telegraph Department were courteous enough to keep the county officers informed of their activities, so far as

they were able, and did inform the county foreman, who was responsible for reporting the matter, that the Department would make good any damage to the road, I see no reason why costs should not be awarded against the informant. These will be fixed at £3 3s.

Information dismissed.

Solicitors for the informant : *Swarbrick and Swarbrick* (Hamilton).
Solicitor for the defendant : *R. W. Chapman* (Hamilton).

WINTER v. LOW.

1946. September 17, before Mr. S. L. PATERSON, S.M., at Cambridge.

Animals—Impounding—Wandering Stock—Stock found Wandering at large on Road—Handed over to Owner without Impounding—Whether Impounding necessary before Offence chargeable—Impounding Act, 1908, s. 17 (1)—Impounding Amendment Act, 1908, s. 2.

The offence created by s. 17 (1) of the Impounding Act, 1908, of being the owner of cattle found wandering at large on the highway is complete in itself, and does not require that the cattle should be impounded before such an offence could be committed.

Shearman v. Kay (1909) 29 N.Z.L.R. 540) referred to.

INFORMATION by an inspector appointed by the Waikato County Council, who charged the defendant with being the owner of six cows found wandering at large on the Hautapu-Te Miro Road in the county contrary to s. 17 of the Impounding Act, 1908. The evidence showed that the informant found the cows wandering at large on the road and drove them to the defendant's farm, where he found the gate was open. The defendant admitted the cows were his, and the informant handed them over to him. The informant did not impound the cows, but had seized them for the purpose of impounding. He did not claim any driving fees from the defendant.

S. Lewis, for the defendant.

PATERSON, S.M. (orally). Counsel for defendant argues that the statute requires that the cattle should be impounded before a breach of the statute is committed. I am not able to agree with this contention. The offence is constituted by the cattle wandering at large on the highway. It would be rubbing it in if the man whose cattle were actually impounded were liable to a fine in addition to pound fees, while the man whose cattle were not impounded should get off scot free. The offence is the same offence as that provided by the Police Offences Act, 1927, s. 4 (2), and the Public Works Act, 1928, s. 176 (o) : see *Shearman v. Kay* (1909) 29 N.Z.L.R. 540).

Moreover, s. 17 (1) of the Impounding Act, 1908, enacts that the liability for the penalty is over and above the liability for the pound and driving fees, while s. 2 of the Impounding Amendment Act, 1908, provides for delivery of cattle seized to the owner before actual impound-

ing, and provides that no such delivery shall exempt any person from any penalty to which he would have been liable if the cattle had been impounded. The fact that the inspector waived driving fees could hardly take away defendant's liability for the penalty.

The defendant will be convicted and fined £3 and costs.

Defendant convicted.

Solicitors for the defendant : *Lewis and Dallimore* (Cambridge).

STRINGER v. SPICER.

1947. March 28, May 2, before Mr. T. E. MAUNSELL, S.M., at Nelson.

Road Traffic—Driving at such Speed that Vehicle could not have been stopped within Half-length of Roadway in Front—Motorist proceeding along Straight Road—Whether Visibility along Intersection Street relevant—Roadway “immediately in front”—Traffic Regulations, 1936 (Serial No. 1936/86), Reg. 17 (1).

A motorist was charged with committing a breach of Reg. 17 (1) of the Traffic Regulations, 1936, which is as follows :—

“No person shall drive any motor-vehicle at such a speed that the vehicle cannot be brought to a standstill within half the length of clear roadway which is visible to the driver immediately in front of the vehicle.”

The evidence showed that the motorist was proceeding along G. Street, and at the intersection with C. Street there were buildings on the corners which obstructed the visibility of traffic approaching the intersection along C. Street.

Held, dismissing the information, That the words “immediately in front of the vehicle,” as used in Reg. 17 (1) of the Traffic Regulations, 1936, relate to the roadway along which the motorist is continuing his course ; and, as the defendant motorist was proceeding along the street in which he was driving, the intersecting street, on his right and left hand, along which he was not proceeding or about to proceed, was not a roadway “immediately in front of the vehicle.”

Donald v. Marshall ([1939] G.L.R. 643) distinguished.

INFORMATION charging the defendant with committing a breach of Reg. 17 (1) of the Traffic Regulations, 1936, in that he drove a motor-vehicle at such a speed that the vehicle could not have been brought to a standstill within half the length of clear roadway which was visible to the driver immediately in front of the vehicle.

The evidence of the Traffic Inspector was that the defendant was proceeding along Grove Street. At the intersection of this street with Collingwood Street, there were buildings on the corners which obstructed the visibility of traffic approaching the intersection along Collingwood Street. Defendant passed the intersection at such a speed that he could not have given way to traffic on his right had there been any.

MAUNSELL, S.M. The defendant, no doubt expecting to be convicted, did not appear. The Traffic Inspector contends that the defendant infringed the provisions of Reg. 17 (1) in that he should have approached the intersection at a speed which would have enabled him to bring his vehicle to a standstill within half the distance of his visibility up Collingwood Street. He relies on two dicta of Blair, J., in *Donald v. Marshall* ([1939] G.L.R. 643). Those dicta are (a) "At that corner there is a building built right at the corner obscuring the view into the square and the regulations call for such a speed at that point as would enable the vehicle to be brought to a standstill within half the length of clear roadway visible to the driver immediately in front of the vehicle" (*ibid.*, 644), and (b) "Regulation 17 (1) speaks of roadway immediately in front of the vehicle. But where there is a corner immediately in front that is part of the roadway and a part from which traffic may be expected and where, as here, that corner was obscured by a building it was the driver's duty as a matter of prudent driving and quite irrespective of the regulations so to have regulated his speed at that corner as would have enabled him to have pulled up in accordance with the half-distance rule" (*ibid.*, 644).

The facts in that case differ materially, in that the party whom the learned Judge held should have observed there had turned the corner, instead of going past it, as in this case. Had the defendant turned the corner into Collingwood Street, the cited dicta would be authority for the proposition that the roadway of both streets on the corner would be roadway "immediately in front of the vehicle."

In my opinion, roadway "immediately in front of a vehicle" relates to the roadway along which the motorist is continuing his course. As the defendant was proceeding along Grove Street, I cannot see how Collingwood Street on his right hand and left hand is roadway "immediately in front of the vehicle," seeing that he is not about to proceed along Collingwood Street. The object of the regulation is to provide a safeguard against a motorist colliding with a moving or stationary object on the course along which he is proceeding. Possible collisions between vehicles at intersections are provided for by a different rule—*viz.*, the "right-hand rule," as recently extended. It may be that the defendant was travelling at such a speed that he committed an offence under the statute, but he did not, I think, commit the offence with which he is charged.

Information dismissed

MUNRO v. AUCKLAND TRANSPORT BOARD.

1946. October 8, 29, before Mr. J. H. LUXFORD, S.M., at Auckland.

Bailment—Gratuitous Bailee—Auckland Tramways—Passenger depositing Hat-box at Rear End of Tram—Conductor telling Passenger to take Hat-box into Passengers' Compartment and indicating Place therein to put it—Hat-box missing when Passenger ready to alight—Whether Transport Board operating Tramways liable.

M. boarded a tram-car operated by the Auckland Transport Board, and placed a hat-box, not exceeding 14 lbs. in weight, in the

rear motorman's cabin ; but the conductor said that luggage could not be left there. He indicated a spot in the passengers' compartment, and told her to put it there. She did so, and, on reaching her destination, it was not to be found. She had paid the ordinary passenger's fare for the journey.

One of the Board's by-laws stipulated that any package exceeding 14 lbs. in weight must be carried on the rear platform at passenger rates ; but no charge was provided in respect of a package not exceeding 14 lbs. in weight, which could be taken inside the passengers' compartment unless the conductor was of the opinion that it would interfere with other passengers' comfort, or impede him in the execution of his duties.

In an action against the Board claiming the value of the hat-box and contents,

Held, 1. That, as the Transport Board was not a common carrier of goods (as was conceded), it was not liable for any loss or damage, to goods brought into a tram-car by a passenger, unless in respect of a breach of its duty as a bailee of the goods.

Hodge v. Wellington City Corporation ((1943) 4 N.Z.L.G.R. 288 aff. on app. Wellington, February 29, 1944, *Sir Michael Myers*, C.J. (unreported)) referred to.

2. That the passenger in taking a package not exceeding 14 lbs. in weight into the tram-car was, in the first instance, a licensee ; but the Transport Board became a bailee on the intervention of its conductor, as delivery was inferred when he directed the passenger to put the package brought by her into the tram-car in a specified place.

Ashby v. Tolhurst ([1937] 2 All E.R. 837) applied.

3. That, as a matter of law, the plaintiff's hat-box was lost at a time when it was in the possession of the Board by virtue of a lawful gratuitous bailment.

4. That, although the possession of the hat-box had passed to the Board as bailee, there was no breach of duty on the part of the Board in the person of its conductor ; and the Board was exempted from liability in respect of the wrongful act of a third person who removed the hat-box from the tram-car ; and there was no negligence on the part of the Board or its servant.

Judgment was accordingly given for the Board.

ACTION claiming the value of a hat-box and contents.

On April 21, 1946, the plaintiff boarded a tram-car operated by the defendant Board and put her hat-box in the passengers' compartment in a place indicated by the conductor. During the course of the journey, the box was stolen, and had not been recovered. The value of the box and its contents was £40, and the plaintiff now sought to recover that sum from the Board.

The Board operates the tramway service in the Auckland Metropolitan area under the powers conferred upon it by the Auckland Transport Board Act, 1928. The plaintiff boarded an ordinary passenger tram-car at an authorized stopping-place, with the intention of proceeding from Epsom to Queen Street in the city. She had with her

a hat-box containing clothing and personal effects. The hat-box was the ordinary portable round type, with flat sides. The plaintiff boarded the tram at the rear end, and, on reaching the platform, placed the hat-box in the empty motorman's cabin. The conductor saw her do this. He told her that luggage could not be put there, but could be taken inside the passengers' compartment, at the same time pointing to a spot behind the first crossways seat on the right-hand side of the compartment, and saying, "Put it there." The plaintiff did so, and proceeded to the fourth seat along on the left-hand side of the compartment. She paid the ordinary passenger's fare only for the journey. On reaching her destination, she got up from her seat and proceeded to the rear of the compartment to pick up her bag before alighting, but the bag was not there. She said to the conductor, "Where is my case?" He thought for a moment and recollected that he had seen a woman get off the tram at the Park Road stopping-place carrying a hat-box. He told the plaintiff about this; also that he had seen a man, whose name he knew, assist the woman to get off the tram. The matter was reported to the Police at once and inquiries were made. The man whom the conductor had recognized was interviewed, but it transpired that he had merely done the courteous act of assisting the woman because she was carrying a bag and had a child with her. The woman was a complete stranger to him. The Police had been unable to trace the woman or the hat-box, and the learned Magistrate found as a fact that it was irretrievably lost as a result of its being stolen by the woman who left the tram at the Park Road stopping-place.

Quartley, for the plaintiff.

A. K. North, for the defendant.

Cur. adv. vult.

LUXFORD, S.M. [After stating the facts, as above:] This is an important case, not only to the Board, but to the public at large, for the tramway system is still the main means of transport for the large population of the Auckland Metropolitan area and most people at some time or another carry parcels or luggage when making a journey by tram. It is necessary, therefore, to set out as fully as possible the principles of law applicable, to determine whether or not the Board is liable for any damage a passenger may suffer by reason of the loss of his luggage or parcels in the course of a tram journey.

It is conceded, and rightly conceded, by Mr. *Quartley*, that the Board is not a common carrier of goods, and so is not liable for any loss or damage to goods brought into a tram-car by a passenger, unless in respect of a breach of its duty as a bailee of the goods. That position was made clear in the judgment of *Stilwell*, S.M. (affirmed on appeal), in *Hodge v. Wellington City Corporation* ((1943) 4 N.Z.L.G.R. 288; aff. on app. Wellington, February 29, 1944, *Sir Michael Myers*, C.J. (unreported)).

The duties of a bailee of goods are governed by that somewhat unique branch of the law known as the law of bailments. It is a unique branch of the law in that it is based partly in contract and partly in tort, and imposes varying degrees of care upon bailees according to each particular class of bailment and the whole of the surrounding circumstances. A bailee of goods is not an insurer of the goods in the sense that, if they are lost or damaged while in his custody, he must make good the loss. In every case in which damage or loss occurs, the bailee is liable only if he has committed a breach of duty in his care of the goods.

A bailment does not come into being until goods are delivered by the bailor to, and are accepted by, the bailee for the purpose of doing some act or thing in respect of the goods and subsequently returning them to the bailor. In other words, legal, if not actual, possession must pass from the bailor to the bailee.

Mr. *North's* first ground of defence is that the Board never became the bailee of the plaintiff's hat-box, because there was no delivery and no evidence of any undertaking on the part of the Board to take the article into its custody. This contention involves a consideration of the Board's by-law regulating the right of passengers to carry goods with them when travelling in a tram-car. The relevant By-law (No. 33) is as follows :

"No person shall take into or upon any tram-car any luggage whatsoever other than parcels not exceeding 14 lbs. in weight which will not, in the opinion of the conductor, interfere with the comfort of other passengers or impede any conductor in the execution of his duties, but luggage or parcels in a portable form not exceeding 28 lbs. in weight which can be conveniently placed on the rear platform may, by permission of the conductor, be carried, but each such parcel shall be paid for at passenger rates."

The effect of this by-law may be summarized thus :

(a) It is unlawful to take into or upon any tram-car any package exceeding 28 lbs. in weight.

(b) A passenger may take into a tram-car any package not exceeding 14 lbs. unless the conductor is of opinion that it will interfere with the comfort of other passengers or impede him in the execution of his duties.

(c) Any package not exceeding 14 lbs. in weight which the conductor considers will interfere with the comfort of other passengers, or impede him in the execution of his duties if taken inside the passengers' compartment, and any other package in portable form which does not exceed 28 lbs. in weight, may, by permission of the conductor, be carried on the rear platform, but must be paid for at passenger rates.

Evidence was not adduced to prove the weight of the plaintiff's hat-box, but I infer that it did not exceed 14 lbs. because it was apparently easily carried, and the conductor must have considered that it was under 14 lbs., as otherwise he would not have allowed it to be taken inside the passengers' compartment.

From the summary I have made of the by-law, it will be seen that any package exceeding 14 lbs. in weight must be carried on the rear platform and paid for at ordinary passenger rates, but no charge can be made for parcels which may lawfully be carried in any other part of the tram-car.

The legal position of a passenger taking any parcel not exceeding 14 lbs. in weight into or upon a tram-car is in the first instance merely that of a licensee. That is to say, the passenger is permitted to do so, and in doing so does not deliver the parcel to the conductor; consequently, no question of bailment can arise at that stage. The moment, however, the conductor intervenes in pursuance of his powers under the by-law, and requires the passenger to put the parcel in a specified place, a new situation arises. The passenger is required to part with the parcel, which must remain in the indicated place during the journey. In the present case, I infer from the evidence that the conductor directed the plaintiff to place her hat-box behind the first crossways seat

because he was of opinion that, if placed there, it would not interfere with the comfort of the other passengers or impede him in the execution of his duties.

The law readily infers "delivery" of goods for the purpose of constituting a bailment. In *Ashby v. Tolhurst* ([1937] 2 All E.R. 837), *Romer, L.J.*, discussed the position of the proprietor of a car park and said that, if a car had been left at the car park "for the purpose of being sold . . . or indeed for the purposes of safe custody, "delivery of the car, although not actually made, would readily be "inferred" (*ibid.*, 845). In the same way, in my opinion, delivery should be inferred when a conductor directs a passenger to put a package brought by him into a tram-car in a specified place. For these reasons, I must find as a matter of law that the plaintiff's hat-box was lost at a time when it was in the possession of the Board by virtue of a lawful bailment. The bailment, however, was gratuitous.

In order to render a gratuitous bailee liable for the loss of goods entrusted to him, the bailor must show that the bailee has been guilty of either a breach of orders, gross negligence, or fraud. There is no suggestion of a breach of orders or fraud in the present case, so the plaintiff must show that there was gross negligence on the part of the conductor. The term "gross negligence" has been the subject of much judicial comment, but it would seem that the term has been used in relation to the degree of care required to be exercised by the bailee. The smaller the degree of care required to be exercised, the grosser is the negligence of him who fails to exercise such care.

The degree of care to be exercised must be ascertained from a consideration of the whole of the surrounding circumstances. Thus it is stated in *1 Halsbury's Laws of England*, 2nd Ed. 734 :

"If the bailee be notoriously either a dissipated, negligent, or imprudent man, and the bailor was aware of the fact, a presumption might, perhaps, be raised that the bailor only expected of him such lax amount of care as the bailee was in the habit of bestowing on his own chattels of a similar nature."

Everybody knows about the duties of a conductor, and that his first and paramount duty is the safety of his passengers. That duty is all-absorbing at stopping-places, where his whole attention is directed to making sure that disembarking passengers are clear of the tram and that embarking passengers are safely aboard before he gives the signal to start. It would be to all intents impossible to discharge that duty if he is required to see that no disembarking passenger picks up a parcel that does not belong to him.

Although in strict law possession of a bailed chattel passes to a bailee, it would be wrong to say, in a case like the present, that the passenger is freed from all responsibility for the care of his or her property. The plaintiff was, throughout the whole journey, in a much better position than the conductor to keep an eye on the bag, especially at stopping-places. Indeed, her failure to do so resulted in her loss. It is not necessary, however, for me to decide whether such failure would, of itself, deprive her of her rights to recover. I prefer to rest my judgment on the ground that there was no breach of duty on the part of the conductor. No reasonable person could expect a conductor to remember the owner of any parcel he directs to be put in a particular spot; on the other hand, a conductor could quite reasonably expect the owner of the parcel to keep an eye on it. Different considerations, however,

would apply to luggage or parcels placed on the rear platform and paid for in accordance with the by-law.

The law has always exempted a gratuitous bailee from liability for the misfeasance of third parties whereby the chattel bailed is damaged or stolen, unless it can be shown that he was guilty of such negligence in its control or custody as to amount to gross negligence or fraud. It is well known that an ordinary tram-car makes no provision for the safe custody of passengers' parcels, and anyone taking parcels on to a tram-car knows that there is a risk of their being stolen if placed on the floor, unless one keeps one's eye on them. The only negligence which might be suggested against the conductor was his failure to recognize the plaintiff's hat-box when he saw the woman alight at Park Road carrying a hat-box. It would, in my opinion, be quite unreasonable to hold that any ordinary man should be able to do that, or even to remember the woman he saw take an article on to the tram.

For these reasons the plaintiff's claim must fail and judgment be entered for the defendant.

Judgment for the defendant.

Solicitor for the plaintiff: *A. G. Quartley* (Auckland).

Solicitors for the defendant: *Earl, Kent, Stanton, Massey, North, and Palmer* (Auckland).

[IN THE COURT OF APPEAL.]

LEVIN BOROUGH AND ANOTHER *v.* ATTORNEY-GENERAL, *Ex Relatione* UNITED THEATRES, LIMITED, AND ANOTHER.

ATTORNEY-GENERAL, *Ex Relatione* LEVIN AMUSEMENTS, LIMITED, AND OTHERS *v.* LEVIN BOROUGH.

COURT OF APPEAL. Wellington. 1946. September 30; October 1, 2, 3, 4, 7. 1947. June 10. BLAIR, J.; KENNEDY, J.; CALLAN, J.

Municipal Corporations—Powers—To "provide or pay to any person such sums as it thinks fit for providing musical entertainments and cinematograph exhibitions"—Arrangement between Borough and Cinematograph Company for Control of Borough's Picture Theatre—Whether Colourable Transaction flouting Enactments specially passed in respect of Leases to meet National Emergency—Whether within Power of Borough Council; and, if so, Valid—Municipal Corporations Act, 1933, s. 308 (1) (e).

An appeal from the judgment of Sir Michael Myers, C.J., reported (1945) 5 N.Z.L.G.R. 218, was dismissed.

An appeal from the judgment of Finlay, J. (unreported) (giving judgment for the defendant, the Levin Borough, in an action for a declaration of the validity of a notice determining the contract which in the previous action was held to be *ultra vires* and void), was also dismissed.

Counsel: *Weston, K.C., O'Shea, and Beere*, for the appellants in both appeals.

Cleary and Harding, for the respondents in both appeals.

Solicitors for Levin Amusements, Ltd.: *O. and R. Beere and Co.* (Wellington).

Solicitors for United Theatres, Ltd., and Waddington: *Barnett and Cleary* (Wellington).

Solicitors for Levin Borough: *Park and Bertram* (Levin).

[IN THE MAGISTRATES' COURT.]

SCHIERNING (INSPECTOR OF FACTORIES) *v.*
NATIONAL TOBACCO COMPANY, LIMITED.

1946. October 14, 21, before Mr. J. MILLER, S.M., at Napier.

War Emergency Legislation—Occupational Re-establishment—Information Charging Offence against Regulations—Whether Worker or Inspector of Factories should be the Informant—Emergency Regulations Act, 1939, ss. 6, 9—Occupational Re-establishment Emergency Regulations, 1940 (Serial No. 1940/291), Reg. 5.

It is competent for an Inspector of Factories to lay an information against an employer for a breach of the Occupational Re-establishment Emergency Regulations, 1940, as the offence is a public one, and not of a private nature, and the penalties imposed are for the benefit of the public; and, consequently, it is unnecessary that the informant should be the worker concerned or that he should authorize the laying of the information.

In re Lorie ((1900) 19 N.Z.L.R. 400) applied.

INFORMATION, laid by an Inspector of Factories against the defendant company containing the following allegation:—

“The National Tobacco Co., Ltd., on March 15, 1946, at Napier
“being the employer of one S. J. Sims for a period of more than four
“weeks immediately prior to his being called up for military service
“and the said worker having applied to the employer before the
“expiration of one month after the termination in New Zealand
“of his military service for re-instatement in his employment, did
“fail to re-instate the said S. J. Sims in an occupation and under
“conditions not less favourable to him than those which would have
“been applicable to him had he not rendered military service”
[contrary to Reg. 5 of the Occupational Re-establishment Emergency Regulations, 1940 (Serial No. 1940/291)].

J. Mason, for the defendant.

Cur. adv. vult.

MILLER, S.M. Mr. *Mason* takes exception to the information. He contends that the worker is the informant, and that the informant should have authorized Mr. Schierning in writing to lay the information: see s. 51 of the Justices of the Peace Act, 1927.

Mr. *Mason* relies upon the cases of *Anderson v. Hamlin* ((1890) 25 Q.B.D. 221), *Reg. v. Panton* ((1888) 14 V.L.R. 529), and *Reg. v. Hare, Ex parte Bush* ((1887) 13 V.L.R. 71).

In those cases, the penalties went to particular bodies, and it was held that outsiders could not lay the informations. Now, all those cases and other cases were referred to in the case of *In re Lorie* ((1900) 19 N.Z.L.R. 400). This was the case of a municipal by-law, and the penalty was paid to the local authority. The learned Judge held it

was competent for any person to lay an information. He disagreed with the cases quoted by Mr. *Mason*, in so far as the ground of the decision was the penalties went to particular bodies.

In the present case, the penalty is fixed by s. 9 of the Emergency Regulations Act, 1939. The punishment provided is twelve months' imprisonment or a fine of £100, or both such imprisonment and such fine.

In addition to the above penalty, Reg. 6 of the above regulations empowers the Court to award the worker the remuneration set out.

The power to make that subsidiary award would not justify classifying the regulations as private regulations under a public Act, even if the cases quoted by Mr. *Mason* applied, upon the ground that a penalty is paid to a private person. The severity of the penalty suggests that the offence is a public one, and not of a private nature.

It has never been suggested that, because the Court has power in case of a common assault to award half the fine to the person assaulted and injured, s. 207 of the Justices of the Peace Act, 1927, is converted into a private part of a public enactment.

However, there is a further distinction to be considered.

When deciding that the test was not the fact that the penalty went to a particular body, *Williams, J.*, held that the true test is as follows (His Honour referred to the case of *Cole v. Coulter* (1860) 2 El. & El. 695; 121 E.R. 261.): "That case draws the distinction between statutes which impose penalties for the protection of the private rights of individuals, and which impose penalties for the benefit of the public. It held, in effect, that in the former case only the person aggrieved can prosecute, while in the latter any one can do so. This case has never been overruled, and I am of opinion that the principle of it ought for every reason to be followed" (1900) 19 N.Z.L.R. 400, 405).

Mr. *Mason* submits that the Emergency Regulations Act, 1939, was enacted for "the protection of private rights" and they concern only the workers and their employers. He submits that the workers only can lay the informations, as the enactment was made for the protection of the workers who had rendered military service.

It seems to me that the Act falls within the latter branch of His Honour's direction—namely, "for the benefit of the public."

The Act and regulations extend far beyond the scope of private rights. It affects a large number of returned soldiers and the community at large. Its primary object is to protect the returned serviceman, but the economic effect of extensive unemployment vitally affects the whole community. The regulations were made to lessen immediate unemployment of the returned servicemen. The right to return to former occupation lessens general unemployment, because a great number of the positions were held by females and retired workers.

The Legislature surely did not intend that the regulations should be purely a private matter, leaving it to the individual worker to prosecute. He in many cases would not have the experience, and he would be put to expense. Moreover, in most cases they would be loath to do so.

The regulations contain the following footnote—namely, "These regulations are to be administered by the Department of Labour."

That, I think, means the Inspector of Factories must prosecute upon his own initiative, because prosecutions must form a substantial part of the administration.

If prosecutions were left to the individual worker, the regulations would be considerably weakened, for a great number of employers would escape punishment. Moreover, it is not just a private matter between the worker and the employer, for those workers seeking re-employment and not insisting upon their rights come into the open market, and they obtain work available for other returned servicemen, who cannot claim the benefit of the regulations. This would make the unemployment position more difficult.

The right to return to the old job is, therefore, not a private matter between worker and former employer, but is one that concerns the public.

Moreover, unless the regulation is treated as a public regulation, the worthy object of the Act would be largely defeated, unless a departmental officer could prosecute on his own initiative.

I hold that the information is in order.

Solicitors for the defendant : *Mason, Dunn, and Fabian* (Napier).

WILSON v. MEADS AND MEADS.

1947. March 10, 18, before Mr. J. H. Salmon, S.M., at Wanganui.

Transport Licensing—Heavy Motor-vehicles—Excessive Load on Motor-lorry in Charge of Driver—Whether Licensee Vicariously liable for Act of Servant—Whether Mens Rea Ingredient of Offence—"Operate"—Heavy Motor-vehicle Regulations, 1940 (Serial No. 1940/78), Reg. 9 (2).

The offences created by s. 9 of the Heavy Motor-vehicles Regulations, 1940, render the licensee, without *mens rea*, responsible although the driver is also liable, and, since intent or state of mind is not of the essence of the offence, the acts or defaults of a servant may make the master or principal liable.

Reg. v. Tyler and International Commercial Co., Ltd. ([1891] 2 Q.B. 588), *Sherras v. De Rutzen* ([1895] 1 Q.B. 918), *Griffiths v. Studebakers, Ltd.* ([1924] 1 K.B. 102), *Pearks, Gunston and Tee, Ltd. v. Ward* ([1902] 2 K.B. 1), and *Mousell Brothers, Ltd. v. London and North Western Railway Co.* ([1917] 2 K.B. 836), applied.

INFORMATION charging the defendants that, on December 19, 1946, at Wangahu, they did operate a heavy motor-vehicle, to wit an International motor-lorry bearing the registered number H12-257, and licensed under Class K, along the main highway, while the load then carried in the vehicle exceeded the maximum load for which it was licensed, contrary to Reg. 9 (2) of the Heavy Motor-vehicles Regulations, 1940.

On the date mentioned, the informant stopped the vehicle in question, which was driven by an employee of the defendants, and found that the vehicle was overloaded to the extent of 12 cwt. 1 qr. The load would have required the vehicle to have been registered in Class M. The defendants are the owners of the vehicle, and a license for this vehicle has been issued to them in class K.

B. C. Haggitt, for the defendants.

Cur. adv. vult.

SALMON, S.M. There is no dispute as to the facts, but the defence is that the defendants have given definite instructions to their drivers that they are not under any circumstances to overload their vehicles. It is contended that the offence charged is a criminal, or *quasi*-criminal, offence, and that an employer in these circumstances is not made liable vicariously for the act of his servant.

It is true that *mens rea* is a necessary element of a criminal offence, but there is a limited class of offences in which *mens rea* is not an essential element. "This class consists, for the most part, of statutory offences of a minor and only *quasi*-criminal character and, in order to determine whether *mens rea* is an essential element of an offence, it is necessary to look at the object and terms of the statute which creates it" (9 *Halsbury's Laws of England*, 2nd Ed. 11, 12, para. 3). "The condition of mind of a servant or agent is not imputed to the master or principal so as to make him criminally liable . . . But in the limited class of cases where a particular intent or state of mind is not of the essence of the offence, the acts or defaults of a servant or agent . . . may make the master or principal criminally liable, although he was not aware of such acts or defaults, and even where they were against his orders" (9 *Halsbury's Laws of England*, 2nd Ed. 12, 13, para. 4).

The Heavy Motor-vehicle Regulations, 1940 (Serial No. 1940/78), are made under the authority of the Public Works Act, 1928, and the Motor-vehicles Act, 1924. The words "to operate" are defined in Reg. 1 (3) as follows: "'To operate' means to use or drive, or cause or permit to be used or driven, or permit to be on any road, whether the person operating is present in person or not." I think there can be no doubt that this definition, and in particular the use of the words "whether the person operating is present in person or not," shows an intention to make some person other than the actual driver of the vehicle responsible—though the driver is also made liable—and such other person can be only the owner or employer—in other words, the holder of the license. The driver here was employed at work which enured for the benefit of his employer. What he did was within the scope of, and in the course of, his employment. It may have been, and no doubt was, merely an act of negligence on the part of the driver. The question is, was his act absolutely prohibited? I think it was. It is, I think, clear that, if the licensee is to be exculpated from breaches of the condition of the license because such breaches were committed by his driver without his authority, or in disobedience of his authority, then the result would be to render nugatory a large part of these regulations. I think, therefore, that these provisions come within that limited class mentioned in 9 *Halsbury's Laws of England*, 2nd Ed. 13,

para. 4, where intent or state of mind is not of the essence of the offence, and the acts or defaults of a servant may make the master or principal liable.

One of the earliest authorities upon the point is the *dictum* of Bowen, L.J., in *Reg. v. Tyler and International Commercial Co., Ltd.* ([1891] 2 Q.B. 588, 592), relied upon by Atkin, J. (as he then was), in *Mousell Brothers, Ltd. v. London and North Western Railway Co.* ([1917] 2 K.B. 836, 845, 846), in a passage which was applied by Lord Hewart, L.C.J., in *Griffiths v. Studebakers, Ltd.* ([1924] 1 K.B. 102), where he said: "I may summarize the matter thus: the statute and regulations require that if a motor-car is used upon a highway it must be duly licensed; for the benefit of manufacturers of motor-cars, who wish to use a car for a special purpose in the way of their trade, limited trade licenses are issued, but to the use of cars covered by such licenses conditions are attached. It would be fantastic to suppose that a manufacturer, whether a limited company, a firm, or an individual, would, even if he could, always show cars to prospective purchasers himself; and it would defeat the scheme of this legislation if it were open to an employer, whether a company, a firm, or an individual, to say that although the car was being used under the limited license in contravention of the conditions upon which it was granted: 'My hand was not the hand which drove the car.' On these facts there ought to have been a conviction of the respondents and also of the driver as an aider and abettor" (*ibid.*, 105, 106). In the same case, Sankey, J. (as Viscount Sankey then was), said: "I agree. The law on this matter was laid down by Wright, J., in *Sherras v. De Rutzen* ([1895] 1 Q.B. 918, 921), where he said: 'There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence, or by the subject-matter with which it deals, and both must be considered.' What are the nature and subject-matter of the statute and regulations with which we are concerned? They deal (*inter alia*) with limited trade licenses, licenses obtainable by motor-car manufacturers at a lower rate for the purposes of their trade. The respondents, holding a license of that limited character, were entitled to use their car for trade purposes on certain conditions being fulfilled. Failure to observe these conditions subjected them to a penalty. The respondents with this license were using through their servant a car for trade purposes—namely, to be shown to prospective purchasers—and it appears to me that they failed to observe one of the conditions imposed, the condition that not more than two persons, besides the driver, should be in the car at that time. In my view there ought to have been a conviction" (*ibid.*, 106, 107).

The same principle was stated by Channell, J., in *Pearks, Gunston and Tee, Ltd. v. Ward* ([1902] 2 K.B. 1, 11), and in *Mousell Brothers, Ltd. v. London and North Western Railway Co.* ([1917] 2 K.B. 836) by Viscount Reading, L.C.J., where he stated: "*Prima facie*, then, a master is not to be made criminally responsible for the acts of his servant to which the master is not a party. But it may be the intention of the Legislature, in order to guard against the happening of the forbidden thing, to impose a liability upon a principal even though he does not know of, and is not party to, the forbidden act done by his

I will not admit the possibility that, if there was any change produced in the aneurysm by the blow, the symptoms deriving from the blow would be delayed for twenty hours. In the state in which this aneurysm was, I think the symptoms would become apparent within a matter of minutes, however small the leak.

The quotations from the evidence of Dr. Foster and Dr. Lynch show that, in their opinions, the wedge injury did not cause the death. Their evidence, like the evidence of Dr. Stewart and Dr. Pearson, gives reasons for their views.

On a consideration of the evidence, it did not appear to be proved that the wedge incident caused the recurrence of rupture of the aneurysm, (i) because the evidence showed that it was not less likely to have been caused otherwise, and (ii) because of the delay between the wedge incident and the onset of symptoms. Counsel for the suppliants suggested that, if the Court was in doubt, the matter should be referred to an independent medical referee for his opinion. In view of the doubt I had, I decided to adopt this suggestion, and I referred the case to Dr. W. Gilmour, pathologist, of Auckland. My submission and his report are as follows:—

Submission under s. 58 (2) of the Workers' Compensation Act, 1922, to a Medical Referee for Report.

The matters herein are submitted for your report.

Frederick William Gear, aged about nineteen and a half, was employed as a rope-boy at the Stockton mine. He played football regularly, and played in a match at Seddonville on Sunday, July 22, 1945. He was not injured during the game, but he had a bad headache after it. He was back at his work on the following day, and, according to the evidence of his father, he was alright, and carried on his work all right, until about August 26. In the meantime, he played several strenuous games of football, including a match on July 26 at Christchurch, another match at Christchurch on July 31, and another match on August 5 at Denniston. He played his usual game in these matches, and made no complaint of any injury or of not feeling well, either during or after any of these games. He carried on his work as usual. At about 6.30 p.m. on August 27, 1945, a wooden wedge about 9 in. long 3 in. across and 2 in. deep was being driven by a fellow-worker. Gear was standing back about 6ft. while the wedge was being driven. The wedge split into two approximately equal pieces. One piece flew and struck Gear on the forehead. It did not make much mark, but Gear appeared to be affected by the blow. He appeared to be very dazed, and spelled for fifteen to twenty minutes. After that, he carried on his work till the end of the shift (10.30 p.m.). He started work again next day at 2.30 p.m., and worked on till about 5.30 p.m., when he complained of a very bad headache. He lay down for a while, but did not get any better, and he was then taken home by a fellow-worker. He was taken to Dr. Simpson's surgery on the way home. He complained to Dr. Simpson of severe headache, and said it was the same as after the football match at Seddon. Dr. Simpson saw him daily till September 1, and then sent him to Buller Hospital for observation. From there he was sent by ambulance on September 6 or 7 to Christchurch Hospital, and he died in Christchurch Hospital on September 7, within a few hours after admission to that hospital.

Post-mortem examination showed that the deceased had a ruptured congenital aneurysm in the Circle of Willis, and that that caused his

death. It is claimed that the blow with the split-off piece of wedge on August 27 resulted in his death. It is common ground that deceased had a congenital aneurysm in the Circle of Willis and that he ruptured it on July 22 while playing football. This rupture healed quickly, enabling
5 the deceased to go on working and playing football. It is claimed that the blow with the piece of wedge caused a recurrence of the rupture. Against that view, it is said that a blow is not a probable cause, that a recurrence of rupture is a result that can be expected in such a case, and that, if the recurrence was caused by the blow, it would normally
10 have shown itself very shortly after the blow, and not twenty to twenty-four hours later, as in this case. In reply to that, it is said that the delay can be accounted for by the bleeding from the second rupture taking place in the brain tissue.

The following questions arise :—

- 15 (i) Does the case show that the second rupture resulted from the blow with the piece of wedge ?
(ii) What is it in the evidence that shows it, or tends to show it, and what is there that tends to the contrary ?
20 (iii) On the known facts, is it equally probable that the second rupture resulted (a) from the blow, (b) not from the blow, and, if the probabilities are not equal, which way does the balance of probabilities lie, and what is there in the evidence that shows it, or tends to show it, and what is there that tends to the contrary ?
- 52 The following documents are attached :—
(i) Notes of evidence taken before me at Westport, Christchurch, and Wellington.
(ii) Copy of the post-mortem report.
(iii) Commentary by Dr. Pearson.
30 (iv) Commentary by Dr. Lynch.
(v) Buller Hospital records.
(vi) Dr. Simpson's certificate, dated September 13, 1945.

REPORT OF MEDICAL REFEREE.

35 It is generally agreed that deceased died from rupture of a congenital cerebral aneurysm, situated on the left posterior communicating artery close to the carotid artery, and that on July 22, 1945, there had been a leakage from this same aneurysm following a game of football, with rapid healing so that symptoms of headache were present for a few hours
40 only. There was no further disability till the onset of severe and similar headache on August 28, 1945.

Of all cases of congenital cerebral aneurysm, between 50 per cent. and 60 per cent. die at the time of first rupture ; of those who survive this initial haemorrhage, about 50 per cent. have a second rupture,
45 which is fatal in a very high proportion of the cases ; this second rupture usually occurs within one month of the first haemorrhage. It will thus be seen that the course of events in regard to Gear was quite typical of many cases of this condition.

Congenital cerebral aneurysm is due to a defect in the wall of the
50 artery ; the wall bulges slowly, and rupture most commonly occurs in the third and fourth decades, but may occur at earlier or later ages. In vestigation has shown that in the majority of cases the rupture of the aneurysm is not related to effort, but, as rupture sometimes occurs during the course of physical exertion or emotional strain, a causal

relationship is then assumed; it would be quite reasonable to say that rupture might be precipitated by a rise in blood pressure. There is, however, very little reference in the literature to minor trauma as a precipitating factor in the rupture of a congenital cerebral aneurysm: it is, of course, obvious that any trauma of sufficient severity to cause brain damage, such as laceration, might easily rupture an aneurysm. 5

In Magee's series of 150 cases, there were eight who suffered a "comparatively minor" trauma; he says the type of trauma was that associated with heading a football or a simple fall: he does not give details of these cases, and he makes it clear that he doubts any relationship in most of them. 10

Rowbotham refers to a case in which a severe subarachnoid haemorrhage occurred twelve hours after a blow; this patient fell off a cycle and was concussed for some time. This, of course, was a severe injury, but Rowbotham admits that a spontaneous rupture of the aneurysm may have caused the fall. 15

Books dealing with the relationship of trauma to disease, such as those of Kessler, Moritz, Stern, and Brahdy and Kahn, quote no cases and either do not refer to the subject or else consider trauma an unlikely cause. 20

Considering that congenital cerebral aneurysms are not uncommon, the absence of any reference to clear-cut cases due to trauma is very striking, but it is what one might expect from a study of recent views on the mechanics of head injuries.

In discussing the relationship of trauma to the present case, it is necessary to recall certain points; the initial haemorrhage in July must have been very slight, as healing occurred very rapidly; during the ensuing month, several strenuous games of football were played with no ill effect; on August 27, 1945, he was struck on the forehead by a piece of wood measuring about $1\frac{1}{2}$ in. by 1 in. and about 9 in. long. He staggered but did not fall, and was dazed for about fifteen minutes, after which he worked till the end of the shift, about four hours. This blow produced no swelling nor bruising of the forehead. There was a slight scratch only; the post-mortem examination revealed no injury to the skull and no bruising nor laceration of the brain; it must, therefore, be regarded as a minor trauma. Another very important point is that no symptoms of haemorrhage developed for about twenty-three hours. This absence of symptoms is explained by Drs. Pearson and Stewart by the bleeding taking place into the brain tissue at first, followed twenty-three hours later by bleeding into the subarachnoid space and the onset of severe headache typical of meningeal irritation. The post-mortem examination showed that haemorrhage had occurred into the brain tissue, but, while it is impossible to deny that it could occur without symptoms, it is highly improbable, as a haemorrhage is not comparable to the very slow development of a tumour or an abscess, which may remain silent till they are large enough to produce pressure symptoms. In addition, if the blow had been sufficient to cause the necessary brain movement to tear the aneurysm, it is far more likely that haemorrhage would have occurred into the subarachnoid space, with immediate onset of headache. 50

In determining the probable effect of the blow on the forehead, I have examined the literature in regard to head injuries. A great deal has been written on the subject, but the most important observations appear to be those of Brown and Russell on the causation of concussion and the more recent work of Holbourn on the mechanics of head in- 55

juries. Injury may affect the brain at the site of the blow, due to indentation or fracture of the skull (this did not occur in Gear's case); or damage may be the result of movement of the brain inside the skull. It must be realized that the brain and cerebro-spinal fluid completely fill the skull, and, as neither is compressible, it is impossible for any movement of the brain to occur apart from movement of the skull.

The experimental observations of Brown and Russell showed conclusively that the production of concussion is dependent on rapid change of velocity of the head—that is, the blow causes the head to move very rapidly and suddenly (called acceleration), or the head is abruptly brought to a standstill, as when it strikes the ground (deceleration). Severe head injuries may be suffered without loss of consciousness, as when the head is crushed, the reason being that there is neither acceleration nor deceleration. This theory of concussion, which is based on experimental work, is generally accepted to-day, but strong support has come from the experimental work of Holbourn with an artificial brain and skull. He demonstrated that, when the head is accelerated or decelerated, the brain will move inside the skull, but only by sliding along the inner surface of the bone. This movement is greater on the vault of the skull, and is very slight at the base, because of the bony projections. As the dura mater is firmly fixed to the skull, it moves with the skull. The arachnoid is less firmly fixed, and moves slightly on the dura. The pia mater is attached to the brain and therefore tends to move with it. The greatest movement is, therefore, between the pia mater and the arachnoid—that is, the brain and pia mater slide on the arachnoid. The fact that such sliding movement does occur has been confirmed by observations in monkeys through a window in the skull and has been recorded by movie camera (Craig, Sheldon, and Fudenz). This movement is minimal when the blow is received directly in front or behind. It may result in tearing of the fine trabeculae which pass between the membrane and the brain, with resulting laceration, which is most marked at the base, where the brain encounters rough raised bone.

Holbourn states that for certain directions of a blow at certain points of the skull—notably, points in the middle—a blow, however hard, produces no rotation and no movement of the brain—*e.g.*, heading a football.

According to Holbourn, it is the momentum of the force which is all important in causing movement and damage of the brain. Thus, when the head strikes a solid object, such as a hard pavement, or is hit by a vehicle, the momentum is very great. On the other hand, when a small object, such as a bullet, penetrates the skull and brain, there may be no loss of consciousness, because, in spite of the high velocity, the momentum is small, and there may be no movement of the brain inside the skull. Holbourn includes in this category such moving objects as bullets, balls, bricks, &c. The case under review undoubtedly comes into this class—an object of small weight and no great speed strikes the forehead in middle-line. The head is not set into rapid motion—that is, there is no acceleration—and, as any movement of the brain inside the skull is dependent on such acceleration, it follows that there could not have been any movement of the brain, and therefore there will be no tearing of adhesions, if any existed, between the aneurysm and the brain.

In conclusion, I consider that the interpretation of the progress of events is quite clear. Had there been no blow on the forehead, the case would have been classified as a typical one. The chief argument

for a causal relationship is one of *post hoc ergo propter hoc*, and it has to be supported by the assumption of a symptomless intra-cerebral haemorrhage of about twenty-three hours' duration. The work of Brown and Russell and of Holbourn provides an explanation of brain damage from head injuries from which it appears clear that the blow from the piece of wedge would be insufficient to cause any movement of the brain, and, therefore, could not have torn the adhesions of the aneurysm to the brain or ruptured the aneurysm itself.

I am therefore of the opinion that the haemorrhage from the aneurysm was not precipitated by the blow on the head on August 27, 1945.

The following references have been consulted :

- [1] Botsford, T. W.—*N.E.J. Med.* 1942, 227, 657.
- [2] Brahdly and Kahn—*Trauma and Disease*, 2nd Ed.
- [3] Courville—*Pathology of the Central Nervous System*.
- [4] Dandy, W. E.—*Ann. Surg.* 1941, 114, 336.
- [5] Falconer, M. A.—*N.Z. Med. J.* 1944, 43, 274.
- [6] Holbourn, A. H.S.—
Lancet 1943, 2, 438.
Lancet 1944, 1, 483.
Br. Med. Bull. 1945, 3, 147.
- [7] Jefferson, G.—*Br. Enc. M.P. Inter. Supp.* 47, Aug., 1946.
- [8] Kessler.—*Accidental Injuries*.
- [9] Magee, C. G.—
Lancet 1943, 2, 497.
Lancet 1943, 2, 512 (L.A.)
- [10] Moritz.—*Pathology of Trauma*.
- [11] Rowbotham.—*Acute Head Injuries*, 2nd Ed.
- [12] Stern.—*Trauma in Internal Diseases*.
- [13] Symonds, C. P., and Russell, W. E.—*Lancet* 1943, 1, 7.

W. GILMOUR, M.D., F.R.A.C.P.

I adopt the report of Dr. Gilmour and find for the respondent, to whom I reserve leave to apply for costs.

Judgment for the respondent.

Solicitor for the suppliants : *Joyce and Taylor* (Greymouth).

Solicitor for the respondent : *F. A. Kitchingham*, Crown Solicitor (Greymouth).

[IN THE MAGISTRATES' COURT.]

ROXBURGH v. LAMBERT.

1947. May 19, 28, before Mr. J. H. LUXFORD, S.M., at Auckland.

Road Traffic—Offences—Overtaking Vehicle without Clear View—Motorist ascending Hill, and pulling out to pass Vehicle travelling in Same Direction—Overtaking commencing more than 300 ft. from Crest of Hill—Manoeuvre not completed until Crest almost reached—Clear View of Road and Traffic ahead diminished to Distance of about 100 ft.—Offence committed—Traffic Regulations, 1936 (Serial No. 1936/86), Reg. 14.

It is an offence under Reg. 14 of the Traffic Regulations, 1936, for a motorist to overtake a vehicle proceeding in the same direction when the driver of the overtaking vehicle has not a clear view of the road and the traffic thereon for a distance of at least 300 ft. in the direction in which he is travelling.

That regulation prohibits absolutely any attempt to overtake, or any part of the manoeuvre of overtaking, a vehicle proceeding in the same direction, within 300 ft. of any part of a road along which a driver's view is obscured by a bend, a crest, a depression, or any stationary or moving obstacle.

In order to observe the rule, a motorist should, *inter alia*, fall back if, before the overtaking is complete, the two cars approach nearer than 300 ft. to a bend or a crest of a hill, or a depression, beyond which there is no vision of the road.

Archer v. Ramstead (1940) 1 M.C.D. 342 applied.

INFORMATION charging the defendant with a breach of cl. 10 (b) of Reg. 14 of the Traffic Regulations, 1936 (Serial No. 1947/44)—namely, that he did overtake a vehicle proceeding in the same direction when he did not have a clear view of the road and the traffic thereon for a distance of at least 300 ft. in the direction in which he was travelling.

The evidence showed that the defendant was proceeding along Lake Road between Devonport and Takapuna. While ascending a hill, he pulled out to pass a truck travelling in the same direction. The manoeuvre of overtaking commenced more than 300 ft. from the crest of the hill, but was not completed until the crest was almost reached. Until the crest was reached, the defendant's clear view of the road ahead and the traffic thereon gradually diminished to a distance of about 100 ft. No vehicle came over the crest of the hill travelling in the opposite direction so as to cause the defendant any concern. He said that a bus passed his vehicle after he had brought it back to its correct side of the road.

Horrocks, for the defendant.

Cur. adv. vult.

LUXFORD, S.M. The regulation, in my opinion, prohibits absolutely any attempt to overtake, or any part of the manoeuvre of overtaking, within 300 ft. of any part of a road along which a driver's view is obscured by a bend, a crest, a depression, or any stationary or moving obstacle. This position was made clear by *Goulding, S.M.*, in *Archer v. Ramstead* (1940) 1 M.C.D. 342. That judgment sets out three important rules which the regulation requires a motorist to observe—namely:

First: If, when a motorist commences his overtaking movement of any vehicle ahead of him, he has a clear view of the road for 300 ft., then he is justified in completing that movement and passing the other vehicle, provided that the view of the road ahead continues to be clear.

Secondly: If, when a motorist is in the act of overtaking a vehicle, another vehicle approaches from the opposite direction, so that there is

no longer 300 ft. of clear road, it is the duty of the overtaking motorist to check his speed and fall behind the vehicle he intended to overtake.

Thirdly : If, before the overtaking is complete, the two cars approach nearer than 300 ft. to a bend beyond which there is no vision of the road, the motorist should fall back.

The third rule applies to the present case. A crest of a hill or a depression may be just as dangerous as a corner, and drivers must refrain from attempting to overtake another vehicle if the movement cannot be completed before reaching a point from which the clear visibility ahead is less than 300 ft.

Defendant convicted.

Solicitors for the defendant : *Holmden and Horrocks* (Auckland).

[IN THE COMPENSATION COURT.]

O'NEILL v. THE KING.

COMPENSATION COURT. Westport. 1946. September 10, 12, 30. 1947. July 2. ONGLEY, J.

Workers' Compensation—Accident arising out of and in the Course of the Employment—Coronary Thrombosis—Coronary Occlusion—Worker with Diseased Coronary Arteries—Collapse while at Work—Onus of Proof on Worker of Strenuous or Unusual Effort—Workers' Compensation Act, 1922, s. 3.

Assuming the adoption of the theory of the school of thought (but without deciding in its favour) that strenuous or unusual effort can cause coronary occlusion where it has been proved that the worker's coronary arteries have become diseased and degenerated at the time of, and for some time before, his collapse, even although the heart attack took place while he was at work, the onus of proof lies on the worker to prove that there was, at or immediately before the time of his collapse, some strenuous or unusual effort on his part which contributed in a material degree to the onset of the thrombosis, or which was a more probable cause of such onset than the disease.

Tansey v. Renown Collieries, Ltd.(1), applied.

Rowbottom v. Shaw, Savill, and Albion Co., Ltd.(2), referred to.

(1) *Ante*, p. 122

(2) *Ante*, p. 6.

PETITION OF RIGHT for compensation and general relief.

The suppliant alleged that on October 7, 1945, and for some time prior thereto, he was employed by the Railways Department at Westport as a crane-driver, and that on that date, while so employed, he met with personal injury by accident by overstraining and over exerting 5

himself in handling the crane controls, in consequence whereof his heart was affected. The Crown denied these allegations. No compensation had been paid in respect of the alleged accident.

The argument is fully dealt with in the judgment.

- 5 *W. D. Taylor*, for the suppliant.
Kitchingham, for the Crown.

Cur. adv. vult.

10 ONGLEY, J. Suppliant's coronary arteries had been in a diseased condition for some time prior to October 7, 1945. On that day, he had a heart attack while operating the crane-levers. It is claimed that the work caused the heart attack. In his evidence, suppliant gave an account of the happening as follows:—

15 On Sunday, October 7, I was feeling quite well when I started work. At lunch-time I was quite well. I ceased work at 4 p.m. The lowering lever took a grip and made a movement forward in which I had to use all I had to bring it back. Immediately after that operation, I could feel something giving way in my chest. It was a pain as if tongs were holding the chest and pressing inwards. I had just finished lowering the hopper. I had to get the wagon off the ship, and the pain I had was getting worse. I got the hopper on to the line again, back on to the truck, and beckoned to the hookers-on that I could not carry on. I then climbed out of the crane the best I could and got down to the wharf and was assisted away by McIntyre, one of the hookers-on. I was laid out in the shelter-shed, and was taken home in a car.

25 Suppliant gives evidence of extra effort on this occasion. Extra effort is an important element in the case. It is common ground that suppliant's coronary arteries were diseased and degenerated at the time of, and for some time prior to, his collapse. It is also common ground that suppliant suffered a heart infarct. The contention for suppliant is that the work caused "coronary insufficiency," which in turn caused the infarct. Alternatively, it is contended that, if the work did not cause "coronary insufficiency," it caused "coronary thrombosis," which in turn caused the infarct. The Crown case is that the infarct was caused by coronary artery disease: that the disease caused thrombosis, which caused infarct. Questions thus arising are:

35 1. What caused the infarct, coronary insufficiency or coronary thrombosis?

2. If coronary thrombosis caused the infarct, then what caused the thrombosis, the disease or the work?

40 3. That raises further questions: (a) Can work (effort) cause coronary thrombosis? (b) Under what circumstances? (c) Do those circumstances exist in this case?

The first question is whether or not this is a coronary occlusion (thrombosis) case. On the evidence, there does not seem to be much doubt on that question. It is a medical question. The doctors called 45 were Dr. F. J. Wilson, of Westport, and Dr. Morvyn Williams, of Wellington, for suppliant, and Dr. M. K. Gray, of Christchurch, and Dr. P. P. Lynch, of Wellington, for the respondent. The hospital diagnosis was thrombosis. Dr. Wilson produced the records, but was not asked, and did not give, his own opinion. In the course of the evidence, Dr. Williams said: "I think that diagnosis is quite likely correct." "I 50 think it more likely than not the thrombus did form." Dr. Gray said: "When this illness came on, there was occlusion of that artery." Dr. Lynch said: "I think the overwhelming probability in O'Neill's

"case is that he developed a coronary thrombosis, and that this was the cause of the infarct." On that evidence, this must be held to be a coronary occlusion case—that is, the infarct was caused by coronary occlusion (thrombosis), not by coronary insufficiency.

The next question is, Can effort cause coronary occlusion? That, again, is a medical question. On this question, counsel for suppliant submitted (i) that the occlusion and infarct resulted from coronary thrombosis, initiated by subintimal haemorrhage; (ii) that the onus of proving that the work did not cause the breakdown is upon the Crown, because suppliant collapsed at work immediately after performing the most strenuous part of his job; and (iii) that, if any onus of proof lies upon suppliant, it has been discharged by the collapse at work at the end of a long and heavy day's work immediately following an operation involving effort and strain. As to the onus of proof, he cites *Gibbs v. Thompson*(1), *Jarvis v. One Tree Hill Borough*(2), *Morgan v. Westport-Stockton Coal Co., Ltd.*(3), and *Charlton v. Makara County*(4). On the question of effort, he cites *Jarvis v. One Tree Hill Borough*(5), *Clover, Clayton, and Co., Ltd. v. Hughes*(6), *Falmouth Docks and Engineering Co., Ltd. v. Treloar*(7), *McFarlane v. Hutton Bros. (Stevedores), Ltd.*(8), and *Oates v. Earl Fitzwilliam's Collieries Co.*(9), and submits there need be nothing in the way of exceptional or unusual exertion; that it is sufficient if the general operations involved in the man's usual work are such as to justify the inference that the work was impeachable for the breakdown. He refers also to *Tansey v. Renown Collieries, Ltd.*(10), and says that it is admitted that there are two schools of thought as to whether effort is impeachable as a factor causing coronary thrombosis by initiating subintimal haemorrhage, and adds that, if the onus is on the Crown to exculpate the work, then the Crown cannot do so while the medical and scientific position is in doubt, because the Crown cannot prove that effort cannot cause coronary thrombosis. Counsel for the Crown calls attention to *Roubottom v. Shaw, Savill, and Albion Co., Ltd.*(11), heard a little over twelve months ago, and submits that the proponents of a new theory (in this case, the theory that thrombosis can be caused by effort) must prove their theory correct and show that it is accepted by a majority of the medical profession. In *Roubottom's* case, eminent counsel and eminent medical practitioners were engaged. In his judgment, *Blair, J.*, said: "It is, so far as I understand the case, common ground that if the injury to the plaintiff's heart is due to thrombosis, then the claim must fail. There is a long line of cases where it has been repeatedly held that injury due to coronary thrombosis is not injury arising out of the employment"(12). There is no doubt that at the time of *Roubottom's* case(13) "thrombosis" was an answer to a claim for compensation. That was because accepted medical opinion and authoritative medical evidence up to then had been that thrombosis resulted from disease, not from effort. Medical research will cause a revision of medical opinion from time to time. The Courts will act on that revision when it comes to the Court by way of evidence.

(1) (1907) 10 G.L.R. 150.

(2) (1940) 3 N.Z.L.G.R. 221.

(3) [1944] N.Z.L.R. 859, 866, 867.

(4) [1945] N.Z.L.R. 335.

(5) (1940) 3 N.Z.L.G.R. 221.

(6) [1910] A.C. 242; 3 B.W.C.C. 275.

(7) [1933] A.C. 481; 26 B.W.C.C. 214.

(8) (1926) 96 L.J. K.B. 357; 20 B.W.C.C. 222.

(9) [1939] 2 All E.R. 498; 32 B.W.C.C. 82.

(10) *Ante*, p. 122.

(11) *Ante*, p. 6.

(12) *Ante*, p. 12.

(13) *Ante*, p. 6.

At present there are two schools of medical thought on the subject, the new school of thought taking the view that effort can cause coronary thrombosis, and that it is, therefore, necessary to evaluate each case on its merits. The other school does not accept the view that coronary
5 thrombosis can be caused by effort. Hence the Crown's submission that the view that effort can cause coronary thrombosis is at present a theory that has not been accepted by a majority of the medical profession. I shall not refer to the evidence on this question. Dr. Wilson did not express an opinion. He was not asked to do so. Dr. Williams
10 said :

I examined him in June, and he gave a history that, while operating a crane on October 7, 1945, he was standing, being of rather short build, with his arms outstretched and retaining hold of the crane-levers, and I understand that both
15 hands were used at the same time. From his description, I gathered that, in lowering a load into the hold, particular strength had to be utilized in controlling the brake-lever, especially during the last phase of the manoeuvre, because, if this control were not exercised, the load would probably descend into the hold at a high speed. My impression from the history was that the degree of physical exertion entailed was very considerable, and that the physical act was rendered no easier
20 by the fact that there was considerable vibration. In other words, suppliant had to brace himself from stem to stern in order to carry out the requisite actions. At this moment, and coincident with this exertion, he was seized with pain in the chest. He managed to descend to the wharf, but could not carry on his work. The pain apparently continued for about an hour and a half, and he was subsequently admitted to hospital, where a diagnosis of coronary thrombosis was made.
25 In considering the question of causation in this case, we assume automatically that suppliant suffers from atheroma of the coronary arteries. In view of the fact that syphilis has been excluded, this is the only possible basic pathology, and is a degenerative condition associated with age and constitutional factors. First, suppliant had no symptoms prior to the incident on October 7, 1945. Secondly, it has been established that he suffered an infarct of his heart. There is a school
30 of thought, which I shall, to clarify matters, term the old school of thought, which maintains that infarction due to coronary thrombosis is quite unrelated to effort, but in the first place it must be realized that infarction can occur without complete occlusion of a coronary artery, in which case we use the term acute coronary insufficiency. This clinical picture has gradually been established over the years,
35 first by authorities in Germany, and subsequently by such authorities as Master, Blumgart, and others in the United States of America. That is one aspect which is, I think, applicable in this case.

40 The evidence referred to earlier shows that this is an occlusion (thrombosis) case. Dr. Williams continues his evidence as follows :—

I now turn to the question whether or not suppliant's upset could have been due to a coronary thrombosis. Evidence is accumulating that so-called intimal haemorrhage is a very important factor in initiating coronary occlusion. Such
45 authorities as Leary (1934), Paterson (1936 onwards), Blumgart, Boas, Morgan of Belfast, and Professor D'Ath of Dunedin have gradually built up a very strong argument that subintimal haemorrhage is the commonest prelude to coronary occlusion. These haemorrhages apparently only occur in arteries which are the seat of atheromatous degeneration. They are minute blood vessels, ill-supported
50 and very prone to leakage. It has been established that there is a direct connection between these intimal vessels and the main blood stream in the coronary artery. It is known that under conditions of physical or emotional stress the coronary circulation increases manyfold with a resulting rise in pressure. In vessels already hardened by atheroma, the natural tendency to dilation of the vessel
55 during effort is hampered, and this would, if anything, tend to raise the pressure in the coronary artery still more. With this rise in pressure there is an accompanying rise in pressure in the communicating intimal vessels. These vessels, being in the condition described above, are, therefore, more than usually liable to rupture during effort. If a large and sudden haemorrhage occurs in the tissues
60 beneath the intima, there is a resulting bulge into the lumen of the coronary artery, and cases are described where total occlusion of a coronary vessel has occurred without any thrombus formation whatever. It has been found that all degrees of subintimal leakage can occur. For instance, a small leakage may cause no symptoms whatever. The degree of symptoms experienced by the sufferer is dependent
65 entirely on the degree of bulge into the lumen of the coronary artery. If this

bulge is considerable, it causes a backwater or eddy in the coronary stream, and then thrombus formation is a likely event. At other times the bulge, being of a lesser degree, may lead merely to partial narrowing of the vessel, which may be sufficient to produce the picture only of angina of effort. Effort is considered particularly significant where the onset of symptoms actually coincides with some severe effort. With the accumulated evidence to hand, the conclusion is quite inescapable that effort must be the causative factor in the case of O'Neill. . . . If he had not had this attack at this particular time, it is possible that he would have gone on working indefinitely, but I would not say it is probable. By that, I mean if he had been permanently on light employment, an incident such as this might never have happened. It is not possible to set any limit on his industrial life, because one may or may not have found evidence suggesting arteriosclerosis.

On cross-examination, he said :

I would say the infarct fully developed probably within a few hours of the initial incident. By that, I mean the process was initiated at the time of his exertion. An infarct does not form in a matter of minutes, it forms in a matter of hours. I have nothing to suggest it was there previous to the collapse. I would say it is a matter of opinion, based on medical and scientific fact, as to which school of thought is right, which is the basis for both schools of thought. . . . I have no doubt that suppliant suffers from arteriosclerosis. That is a degenerative and progressive disease. The disease can develop even if a man is doing work of the lightest type. It is the commonest cause of death by natural process. Suppliant told me he had been doing this work for twenty years or more, and I take it that the work he was doing this day was the same as he had been doing in the past.

In answer to the Court, he said :

I think the amount of exertion required to produce these results is purely arbitrary. I do not think there is any way of estimating the degree of exertion necessary. The exertion of working the crane is an unusual exertion, despite the fact that he was doing it for some years.

Three points in Dr. Williams's evidence should be noted : (i) his impression that "suppliant had to brace himself from stem to stern in "order to carry out the requisite actions" ; (ii) that effort is considered particularly significant where the onset of symptoms coincides with some severe effort (note "severe") ; and (iii) that it is a matter of opinion which school of thought is right—i.e., whether thrombosis can be caused by effort.

Dr. Gray said :

The general opinion about moderate exertion on the formation of an occlusion of the coronary artery is that it has no effect at all. My authorities I produce are (without exception, they all say that moderate exertion has no effect) : Boas in the 1939 *Journal of the American Medical Association*, 1891, says it is very difficult to visualize actually what goes on in the artery, and difficult to follow how effort can produce thrombosis ; the *Journal of Industrial Medicine*, August, 1939—Master, Dack, and Jaffe have conducted a very extensive research into the cause of the onset of coronary thrombosis. They analysed 767 cases, and found the incidence of attack was the same during morning, afternoon, evening, and night. Dividing the twenty-four hours into four periods of six hours, and beginning at 7 a.m., the percentage of attacks in each period varied only from 23.5 per cent. to 26.1 per cent. They found that, considering the hours of day individually, there was a greater number of attacks at 2 a.m. and 10 p.m. Their conclusions of the whole article were that only 2 per cent. of attacks occurred in relation to strenuous exertion, and that in 9 per cent. the patient was engaged in moderate activity. They say, considering these percentages in relation to the portion of the day commonly spent in these activities, it was concluded they were not causally related to the onset of the attack. That is as regards moderate exertion. As regards strenuous exertion, there are opinions that do show that strenuous exertion has an effect. That is not proved, but is only surmised. That is the intimal haemorrhage, but they have not been able to visualize what happens on effort with relation to the haemorrhage. It has never been proved. I have not seen the report of Dr. D'Ath quoted in *Tansey's* case. Experimentally, they have produced far greater pressure in the coronary arteries than ever occurs at work, and it has had no effect. Assuming the work to have been strenuous, I would say there

is a possibility, but I would not go any further than that. It is correct that there are two schools of thought. The narrowing of the arteries is a progressive degenerative change. Thrombosis is not inevitable. I think in this case the thrombosis was inevitable. I would not agree the vibration would have any effect on it. The most I will say is that very strenuous exercise may have had some effect—we do not know enough about it. I do not know if the work suppliant was doing was strenuous work. The point all these people make is that the work is strenuous and unusual. I consider thrombosis was bound to come on, and sooner or later he would have been incapacitated. If he had been only pottering round in the garden doing light work, it would have come on at the same time.

On cross-examination, he said :

It is reasonable to suppose that suppliant's arteries were in a defective condition prior to October 7, 1945. A man with arteries in that condition should be exercising himself only within the limits of that capacity. . . . I agree that early in October he was a candidate for cardiac trouble. It was not a good thing for him to have worked the long hours he did on October 6 and 7. . . . But a condition of coronary insufficiency, if prolonged, may produce an infarction without an actual thrombosis. I do not think you can say from my cardiograph taken in February whether the infarct was due to insufficiency or occlusion. If it had been taken earlier, you could say. I think it fair to qualify all this about coronary insufficiency and infarcts coming on from insufficiency by saying all that is highly speculative and not proven. I agree insufficiency may be caused by effort, but I do not agree coronary occlusion may be caused by effort. Coronary occlusion may be caused by a blood clot or by an atheromatous patch on a diseased plaque. I cannot say which type of occlusion this was. Either will probably result in an infarct. You can get occlusion without an infarction. I said moderate exercise and accustomed exercises would have no effect, but strenuous exertion might possibly have an effect. Some people say blocking from a necrosed patch can be caused by effort. I would not express an opinion on the quotation made by Dr. D'Ath from Boas in *Tansey's* case as follows: "With physical effort . . . a softened atheromatous plaque may rupture into the arterial lumen." The reference is probably 1939 *Journal of the American Medical Association*, 1891.

Dr. Gray's opinion should be noted. It is that moderate exercise and accustomed exercise would have no effect, but strenuous exercise might possibly have an effect.

Dr. Lynch said :

Infarction of the heart is always associated with coronary narrowing, and most frequently is due to coronary thrombosis. This condition occurs in widely varying circumstances, and is not necessarily or ordinarily related to effort. The process of coronary occlusion or narrowing which precedes the infarction is due to the natural progress of the disease in the artery wall. There is first of all formation of plaques on the vessel wall, then encroachment of the lumen, then roughening of the plaque by degenerative changes, and then final occlusion or blocking of the artery by the formation of clot. In the ordinary course of the disease, this final occlusion by a clot is a slow process and of gradual onset, although the symptoms produced by the final blocking of the vessel come on usually with dramatic suddenness. . . . I think that in the main coronary thrombosis arises as the result of the natural progress of the disease. Those cases in which effort is an exciting cause of the thrombosis are, in my opinion, an almost negligible minority. I have made post-mortem examinations and microscopical examinations of diseased arteries in very many cases of persons who have died from coronary thrombosis and infarction of the heart. I have not yet encountered a case in which I was reasonably satisfied that effort precipitated the development of the thrombus. I agree with Dr. D'Ath that each case should be evaluated on its merits. In doing so, I think the quantum of the effort involved and the circumstances under which the effort is elicited are of considerable importance. The work which Mr. O'Neill was doing was heavy work. By this, I do not mean that it required unusual physical strength. He himself says that it was responsible work, and no doubt it was. I regard it as being a skilled occupation, requiring rather nice judgment and a good sense of timing rather than heavy physical exertion. It was work to which Mr. O'Neill was accustomed, and I am sure work which, to him, must have been second nature. I cannot imagine that in the course of his work during a day there would be any notable change in his circulation. I do not think the work, heavy though it was in the general sense, would occasion any substantial change in his pulse rate or any appreciable alteration in his arterial blood pressure.

These I believe to be the only circumstances under which effort is likely to be the exciting cause of coronary thrombosis, by initiating a small haemorrhage into an atheromatous plaque on the vessel wall. I think there is this sharp distinction between O'Neill's case and *Tansey's*: that Tansey was suddenly exposed to unusual strain and to a set of circumstances in which there was some element of personal danger. I think this is an important consideration. For these reasons I do not believe that the work which O'Neill was doing at the relevant time or the effort which the work as he described it involved was a material factor in the onset of his disablement from coronary thrombosis. . . . As to the quantum of effort which might be regarded as being a factor, it is difficult to fix a standard for that, because it is purely arbitrary, but my view is that the quantum of effort and the circumstances under which the effort is called for should be such as to give rise to some substantial changes in the circulation, either by raising the arterial blood pressure or accelerating the pulse rate. I think an unusual effort, one called for, say, in some situation of emergency or danger, would be more likely to produce a change in the circulation which might do harm. In a man who is going about his ordinary work, and particularly work to which he has been accustomed by months or years of experience, I think that, with the ordinary variation of intensity of the work in the course of a day, such as this man's work, that would not produce the conditions which might initiate an intimal haemorrhage. The conditions under which thrombosis or occlusion of a vessel may occur seem to be just as much dependent on chance as the rupture of a congenital aneurysm. I realize that that leaves the position, as far as suppliant is concerned, as one in which the occurrence of the changes in his coronary circulation while he was working was due to coincidence. I think it can be assumed that the arteries were diseased, and the fact that he had no symptoms prior to that particular moment does not mean there were no changes occurring in his arteries. The process of thrombosis in the artery is a gradual one, and the clot may build up within the artery and not produce any symptoms until occlusion or complete blockage of the artery occurs, and it may not be until that moment that the symptoms arise. The building up would be more likely to be a matter of days than of weeks. The narrowing of the arteries is progressive. It is common experience that a man may die suddenly from coronary disease in which there is an extreme degree of narrowing of the coronary arteries, and up to the moment he dies he may never have made a single complaint relating to his heart. The absence of symptoms, and appearance of good health, do not enable one to infer that the diseased changes date from the onset of symptoms.

On cross-examination, he said :

Had I known the condition of his arteries, I would have advised him to give up heavy work, because the disease is a progressive one. Work which he could previously do with ease would soon lie beyond the capacity of his damaged heart muscle, and, with this disease, if he were so to exert himself beyond his capacity, he might initiate changes in his cardiac rhythm which might cause sudden death. In advising a man who had diseased coronary arteries regarding his work, I would take into account the nature of his work. I would say that a factor which would adversely affect him would be long periods of physical and mental strain. The changes of degeneration are so gradual that I doubt whether, in a particular case, you could say a particular period of worry or a particular period of unusual effort produced in itself any appreciable acceleration of the natural process. It is cumulative and prolonged in its action and quite independent of physical factors. I agree that, if I had known the condition of suppliant's arteries, I would have advised him to give up this job. I believe that the commonest cause of infarction of the heart is occlusion. I think there are cases, which, in my experience, are extremely rare, where infarction may be caused without occlusion from acute coronary insufficiency and merely due to the discrepancy between the demands of the heart for blood and the capacity of the narrowed arteries to supply that blood. I suppose there would be pain in that process. The cause of the infarction can only be inferred, but I would infer it was due to an occlusion, because, in my experience, that is by far the commonest cause. Assuming it was due to coronary insufficiency, it is the theory that effort is the cause of the coronary insufficiency—prolonged and unusual effort, not effort to which the man is accustomed. My view is that there is rarely any relationship between effort and the onset of coronary occlusion. I know there are two sharply divided schools of thought on that point.

Summarized, Dr. Lynch's opinion is "that in the main coronary thrombosis arises as the result of the natural progress of the disease," that "these cases in which effort is an exciting cause are an almost negligible

"minority," that he does not believe the work or the effort was a material "factor in the onset of his [suppliant's] disablement from coronary "thrombosis," and that the clot takes time (hours or even days) to build up, and may not produce symptoms until complete blockage occurs. Dr. D'Ath's report in *Tansey's* case(14) has been referred to. That report was made by Dr. E. F. D'Ath of Dunedin to assist this Court in *Tansey's* case. It reviewed a great many authorities (they are listed in the report), and made it clear that there are two schools of thought on the subject. Referring to the "new school," he says :

10 They believe, from their experience, that bodily effort may, in some cases, directly induce the closure of a coronary artery with consequent cardiac infarction, and that this appears to be of sufficient frequency to be of practical clinical importance, as well as of medico-legal significance(15).

Dr. D'Ath's report proceeds :—

15 It is their opinion that the accepted studies of Paterson, Winternitz, and others suggests how unusual exertion may bring about coronary artery occlusion(16).

This seems to emphasize "unusual exertion." The report goes on, "Boas puts the matter briefly and clearly when he says," then follows a quotation from Boas in which the following passages occur :—

20 With physical effort there is a sudden alteration of arterial pressure, cardiac action is increased, rupture of one of the capillaries in the arterial wall may occur, or a softened atheromatous plaque may rupture into the arterial lumen. . . .

25 When an unusual strain during work is followed by cardiac disability in the sense outlined, and when this occurs in a person who has been previously well and free from symptoms while at work, it is proper to conclude that the disability was induced by the work, and is therefore compensable(17).

"Sudden alteration of arterial pressure" and "unusual strain" are referred to. Dr. D'Ath's conclusion is—

30 After careful and critical analysis of all the recent literature on the subject, I have been strengthened in my opinion that there is now sufficient clinical and pathological evidence to warrant the deduction that effort is, in certain cases, the determining factor in the onset of coronary occlusion.

35 Recognition of the fact that effort can induce cardiac infarction makes it necessary to evaluate each case on its merits. It may be said in a general way that where a patient's complete disablement follows immediately on the incident of effort to which the disability is ascribed, the causal connection will usually be clear. Where, however, the final episode of complete disability is delayed for some hours or days there must be a continuity of symptoms dating from the event to the actual moment of complete disablement(18).

40 The articles by Boas referred to by Dr. D'Ath are : (a) Angina Pectoris and Cardiac Infarction from Trauma or Unusual Effort. J.A.M.A. 112 : 1945, 1887. (b) Cardiac Infarction induced by Unusual Effort. J. Mount Sinai Hosp. 7 : 1941, 307. (c) Some Immediate Causes of Cardiac Infarction. Am. Heart J. 23 : 1942, 1.

45 Dr. Williams cites Boas in support of his opinion. Dr. Gray cites articles by Boas for the statement "that moderate exertion has no effect." "Unusual exertion," "sudden alteration of arterial pressure," "unusual strain during work" are the terms used in the extracts cited by Dr. D'Ath.

50 In 1945, Blumgart summarized his conclusions as follows :

The histories of eleven patients with acute myocardial infarction consequent to strenuous effort illustrate the relationship between the two.

(14) *Ante*, p. 122.

(17) *Ante*, p. 129.

(15) *Ante*, p. 126.

(18) *Ante*, pp. 129, 130.

(16) *Ante*, p. 129.

He proceeds as follows :

The clinical criteria which must be satisfied to demonstrate this relationship are (a) the development and increase of cardiac symptoms such as pain or substernal distress during or immediately following unusual effort.

He goes on to set out additional criteria which must be present, but these do not concern us here (*Journal of the American Medical Association*, July 14, 1945 : "The Relation of Effort to Attacks of Acute Myocardial Infarction"—Lieutenant-Colonel Herrmann L. Blumgart). In a reply to that article, Master says :

In an article in the *Journal*, July 14, entitled "The Relation of Effort to Attacks of Acute Myocardial Infarction," Blumgart has challenged the work of my associates and myself. He believes that in a "small proportion" of cases strenuous exercise may induce coronary occlusion. We believe that in no instance is there any relation : 1945 *Journal of the American Medical Association*, 90.

The foregoing extracts show the conflict of opinion on the subject, but it does appear that the view that effort can cause occlusion (thrombosis) implies unusual exertion or something causing a sudden alteration of arterial blood pressure.

It is necessary to evaluate the case on its merits. To do that, it is necessary to ascertain what suppliant was doing when he collapsed, and whether that was something likely to cause him unusual exertion or a sudden alteration of arterial blood pressure. This evidence begins with Mr. Crawford McIntyre, who spoke to suppliant when suppliant came down from the crane immediately after the occurrence. Mr. McIntyre says :

I asked him what was wrong, and he said the reversing lever had jarred him. I assisted him down to the shelter-shed, where I laid him down. I had nothing more to do with him after that. I did not know what he meant when he said the lever had jarred him. He said nothing about strain to the chest.

Next comes the hospital record, made the following day. It states :

Severe pains in cardiac region, headaches, perspiration. History : Symptoms occurred one day prior to admission.

Next is a further hospital record of December 4, as follows :

The patient had a sudden onset of nausea followed by precordial pain and semi-consciousness and shock, pain gripping in nature—two months ago—a typical coronary thrombosis evidently.

Next is Dr. Gray, who inquired into the case for the Railways Department. He says :

I inquired whether the work involved was unusually severe, and have a note : "Not any particular exertion, but his work was rather worrying." I said I particularly inquired into what suppliant was doing, and said it was not strenuous work.

Next, Dr. Wilson inspected the crane with suppliant, and was given a demonstration. He said :

I would describe the work as being work of considerable responsibility. It is heavy work. There is a lot of stress on both arms, not all the time, but during certain times during the manoeuvre. The work appeared to me to require a strong grip of the levers with both hands. I did not try the levers of the crane. I am not in a position to say what strength is required to push or pull these levers.

Nothing seems to have been said to Dr. Wilson about the lever taking a grip on the occasion that suppliant collapsed, or that there was any extra exertion on that occasion. Extra exertion is now relied on, and it is a matter for comment that nothing was said to Dr. Wilson about it when he was being given a demonstration for the very purpose of enabling him to give evidence as to the effort exerted by suppliant

at the time of his collapse. As to the effort required to operate the levers (leaving out the question of extra exertion on this occasion), Dr. Williams says he is not in a position to say what strength is required. Dr. Wilson saw the work, and he does not support Dr. Williams's impression that suppliant had to brace himself from stern to stern to carry out the requisite actions. Next is Dr. Williams. He examined suppliant in June last. Dr. Williams says :

From his description, I gathered that, in lowering a load into the hold, particular strength had to be utilized in controlling the brake-lever, especially during the last phase of the manoeuvre, because, if this control were not exercised, the load would probably descend into the hold at a high speed. My impression from the history was that the degree of physical exertion entailed was very considerable, and that the physical act was rendered no easier by the fact that there was considerable vibration. In other words, suppliant had to brace himself from stern to stern in order to carry out the requisite actions.

Dr. Williams makes no reference to the lever "taking a grip," and says that he took it that the work this day was the same as suppliant had been doing in the past. At the hearing, suppliant said :

The lowering lever took a grip and made a movement forward in which I had to use all I had to bring it back.

So far as extra effort is relied on, the burden of proof is on the suppliant to show that there was extra exertion on the occasion of his collapse. Nothing was said to Dr. Wilson about extra effort, or the lever taking a grip. Dr. Gray says suppliant told him there was not any particular exertion. Suppliant denies that he told Dr. Gray this. Nothing seems to have been said to Dr. Williams about extra effort or the lever "taking a grip." On the evidence, I am not able to find that there was anything unusual, or any unusual effort, required in working the crane at the time suppliant collapsed. Counsel for suppliant has submitted that nothing in the way of exceptional or unusual exertion is needed. That submission is in accordance with the decision in *Oates v. Earl Fitzwilliam's Collieries Co.*(19). It is there laid down as follows : "In our judgment a physiological injury or change occurring in the course of a workman's employment by reason of the work in which he is engaged at or about that moment is an injury by accident arising out of his employment ; and that is so though the injury or change be occasioned partly, or even mainly, by the progress or development of an existing disease, if the work which he is doing at or about the moment of the occurrence of the physiological injury or change contributes in any material degree to its occurrence : and this is none the less true although there may be no evidence of any strain or similar cause other than that arising out of the workman's ordinary work"(20). That case shows that it is sufficient to prove that the ordinary course of work contributed in a material degree to the particular injury, but it does not show that the ordinary course of work can cause or contribute in a material degree to an attack of thrombosis. That is the contest here. Coronary thrombosis has occurred in this case, and it seems that coronary thrombosis requires some extra or unusual effort to bring it about. That is according to the new school of thought, which is the school of thought favourable to suppliant's case. The test is whether the work contributed in a material degree to the onset of thrombosis. It is for the suppliant to prove that it did, unless the onus has been shifted. To shift the onus, he must prove that "the accident arose under such circumstances that it may fairly be said

(19) [1939] 2 All E.R. 498 ; 32 B.W.C.C. (20) *Ibid.*, 502 ; 90.

"to have arisen in the course of the employment and out of it": *Macdonald's Workers' Compensation in New Zealand*, 2nd Ed. 294, para. 556; and "where there are two or more possible causes of injury or death, "for one or more of which the defendant is not responsible, the plaintiff "must show by evidence that the injury was wholly or partly the result "of that cause which would render the defendant liable. If the evidence "in the case leaves it just as probable that the injury was the result "of one cause as of the other, the plaintiff cannot recover": *ibid.*, 296, para. 559. In this case, there is something more than a possible cause other than effort: there is disease, which is a usual and probable cause of thrombosis. Counsel for suppliant submits that the onus should rest on the Crown, because (i) medical knowledge as to causation of coronary disturbances is imperfect and incomplete, and even the most eminent medical scientists are in sharp disagreement; (ii) suppliant's collapse was what the layman would expect from the performance of such work by a cardiac subject; and (iii) any prudent physician, knowing the condition of O'Neill's arteries on October 6 and 7, would have advised him against the work as being too strenuous and arduous, and likely on that account to lead to cardiac disturbance.

It is true that the medical position is doubtful, but the doubt is whether effort can cause thrombosis. That doubt is not a good ground for presuming that effort did cause thrombosis, and so shifting the onus. It is true, as counsel for suppliant submits, that a prudent physician knowing suppliant's condition would have advised against the work because of his diseased heart condition. No doubt a layman would take the same view, but those circumstances do not help to determine the vital question whether effort can cause coronary thrombosis. Dr. Williams is of the opinion that it can, in certain circumstances, and that it did so in this case. The opinion of Dr. Gray and Dr. Lynch is that thrombosis is the result of disease, and that it has not yet been established that thrombosis can be caused by effort at all, and that, in any case, moderate and usual effort has no effect in the causation of thrombosis. Dr. Williams's opinion that thrombosis was caused by effort in this case is based on the view (i) that suppliant had to brace himself from stem to stern in doing the work, and (ii) that effort is particularly significant where the onset of symptoms actually coincides with some severe effort. On the evidence, I do not find that there was on this occasion any more effort than the ordinary and usual effort of working the lever, which the suppliant makes every two to three minutes in the course of his work as a crane-driver. Dr. Williams regards coincidence with severe effort as particularly significant. *Tansey's case*(21) was a case of coincidence with severe effort. Dr. D'Ath stresses effort in his report on that case. Dr. J. C. Paterson (cited by Dr. Williams and Dr. D'Ath) says this in *112 Journal of the American Medical Association*, 897:

It is suggested, therefore, that high coronary blood pressure, the result of strenuous exercise or of emotion (or of persistent hypertension), is one of the underlying causes of capillary rupture and intimal haemorrhage in arteriosclerotic coronary arteries. If conditions are favourable, the various changes which result from capillary rupture may then be the initiating factors in the deposition of coronary thrombi.

"Suggested" and "strenuous exercise" should be noted. Boas, another authority (cited by Dr. Williams in this case and by Dr. D'Ath in *Tansey's case*), says:

There is considerable variation in the time that elapses before the full symptoms and incapacity develop. In many instances extensive cardiac damage occurs immediately after the accident, or follows within a few hours. In others, there is a free interval of many hours, or even of several days between the accident and the development of major cardiac damage, and during this interim the patient may complain of little beyond weakness and some uneasiness in the chest. In still other cases there are continuous symptoms of minor cardiac embarrassment after the accident, but these may not be severe enough to incapacitate the patient. Finally, after days or even weeks, a complete coronary occlusion occurs, leading to complete disability.

When an unusual strain during work is followed by cardiac disability in the sense outlined, and when this occurs in a person who has been previously well and free from symptoms while at work, it is proper to conclude that the disability was induced by the work.

This statement is quoted by Dr. D'Ath in *Tansey's* case. In Dr. Paterson's article, there is this further statement :

The formation of coronary thrombi is a gradual process, sometimes occupying several days before occlusion of the coronary lumen with its resulting cardiac pain is produced. Therefore the activities of a patient immediately preceding the onset of an attack of coronary thrombosis have no relation to the etiology of the precipitation of a thrombus but are purely coincidental.

On the view that strenuous or unusual effort can cause thrombosis, we get this : suppliant had disease from which thrombosis results, and it comes on at any time. It came on while suppliant was operating the crane-lever. Suppliant says it came on because he was operating the crane-lever. For that proposition he relies on the school of thought which says that strenuous or unusual effort can bring it on. The evidence does not prove strenuous or unusual effort. Therefore, I am unable to hold that the work caused, or could cause, the attack of thrombosis, or to hold that the work is a more probable cause than the disease. The claim fails. I reserve leave to respondent to apply for costs.

Judgment for the respondent.

Solicitors for the suppliant : *Joyce and Taylor* (Greymouth).

Solicitor for the Crown : *F. A. Kitchingham*, Crown Solicitor (Greymouth).

[IN THE MAGISTRATES' COURT.]

RUMBLE v. TIMARU BOROUGH.

1947. February 25, March 19, before Mr. G. G. CHISHOLM, S.M., at Timaru.

Municipal Corporations—Sideshow License—Refusal by Borough Corporation—Refusal based on Probable Interference with Peace and Quiet of Persons Living in Vicinity, and Unsuitability of Site—No Legal Sanction for Refusal—Municipal Corporations Act, 1933, s. 312—Municipal Corporations Amendment Act, 1938, Schedule, Cls. 1, 4.

A showman arranged for the use of a portion of land in Timaru for the purpose of opening a sideshow during the holiday season. The land had been let to another showman, A., who had opened a refreshment stall thereon under an itinerant trader's license granted by the local Borough; and A. had sublet portion to the said showman, who erected and opened his stall without a license. On being informed by the Borough Inspector that a license was necessary, he applied, but the license was refused.

On appeal by the showman against the Council's decision in refusing the application for the sideshow license,

Held, 1. That the appellant was an "occupier" within the meaning of that word as used in Cl. 1 of the Schedule to the Municipal Corporations Amendment Act, 1938, and that term means nothing more than one who is legally in possession.

2. That the license was not refused because of non-compliance with any of the conditions of the Schedule to the said statute.

3. That there were no particular provisions in the Municipal Corporations Act, 1933, or otherwise, which would give the Council power to refuse the application on the grounds that the sideshow would interfere with the peace and quiet of the persons living in its vicinity, or because it was of opinion that the land on which the sideshow would be carried on could be regarded as unsuitably placed for the carrying-on of the sideshow.

4. That the Council's refusal was without legal sanction, and, if the appellant complied with the conditions set out in the said Schedule, he was entitled to the license.

APPEAL under Cl. 4 of the Schedule to the Municipal Corporations Amendment Act, 1938, against the decision of the Timaru Borough Council in refusing appellant's application for a license to carry on a sideshow, being one of the purposes specified in s. 312 of the principal Act—*viz.*, the Municipal Corporations Act, 1933.

The appellant was a showman resident in Christchurch, and in December, 1946, he arranged for the use of a portion of land at the corner of Wai-iti Road and Hewling Street, Timaru, adjacent to Caroline Bay, for the purpose of opening a sideshow during the holiday season. The land was the property of one Evans, and was known as "Evans's" section."

Evans had let this property to another showman, Andrews, who had opened a refreshment stall thereon under an itinerant trader's license granted by the Council, and Andrews had sublet portion to the appellant.

Appellant had erected and opened his stall without a license. He stated that he was under the impression that, as Andrews already had a license, it was not necessary for him to apply. When advised by the Borough Inspector that a license was necessary, he made a written application on December 18, 1946, and his application was refused in a letter from the Town Clerk dated December 19. He now appealed against this decision.

D. J. Hewitt, for the appellant.

M. C. Gresson, for the respondent.

Cur. adv. vult.

CHISHOLM, S.M. [After stating the facts:] Mr. Gresson takes the preliminary objection that the application and appeal are incorrectly made, in that the appellant is neither the "owner" nor "occupier" of the building: See cl. 1 of the Schedule.

"Occupier" is defined in the Act as "*inhabitant* occupier," and it is submitted that the Court should regard "*inhabitant*" in the sense of one who dwells or has a permanent residence, in which case it is submitted that only the owner, Evans, could properly make this application, as he is a permanent resident in the Borough, whereas the appellant is not. Such an interpretation would lead to the anomalous position that, whereas an "occupier" would require a residential qualification, an "owner" might apply as such without any such qualification. I find other dictionary meanings which lead to no such anomaly, *e.g.*, "*inhabitant*: one who has a legal settledment"; "*settlement*: the act of giving possession by legal sanction." "Occupier" is one who holds possession.

I think, therefore, that "occupier" means nothing more than one who is legally in possession, and this objection must fail.

It remains now to consider whether appellant, having made an application for a license and having been refused, is entitled to redress.

Clause 1 of the Schedule deals with the making of the application, and, the only objection to this having been already overruled, the application can be regarded as being in order.

Clause 2 sets out the conditions under which the application may be granted or refused. Shortly, these conditions provide that, if the Council is satisfied with reports as to the security and suitability of the building, the means of ventilation and of ingress and egress, the sanitary arrangements, and the safeguards against fire, it *shall* issue the license.

There is no provision in the Schedule for the exercise by the Council of any general discretion in the matter.

The refusal of the application was conveyed to applicant in a letter signed by the Town Clerk in the following terms:

"I am directed to acknowledge receipt of your application of
"18th instant addressed to His Worship the Mayor.

" Council is not prepared to grant a license for public amusements in respect of section at corner of Wai-iti Road and Hewling Street.

" I therefore have to inform you that your application is declined."

There is no evidence that the Council took any of the steps provided for in Cl. 2 of the Schedule, nor is there any indication in the above letter that the application was refused for any of the reasons set out therein.

The evidence led by appellant for the most part dealt with the allegation that the Council was biased in its attitude towards the application, but it did cover the questions of sanitation, ingress and egress, and water supply.

Respondent's evidence denied the charge of bias, and showed that the Council had received complaints from residents of the neighbourhood and had passed a resolution to the effect that no licenses would be granted under any circumstances for public amusements on that section.

It is clear, therefore, that the refusal of the license was not because of noncompliance with any of the conditions of the Schedule, and indeed it is not suggested by respondent that this is so.

What the reason for refusal was appears in respondent's answer to the appeal filed in Court. Clauses 3 and 4 of this answer read :

" 3. The Council refused the said license because the Mayor and some councillors of the Borough of Timaru had received requests from persons living in the vicinity of the said section (who had observed preparations being made regarding the sideshow of the appellant) that such a license should not be granted and the Council after consideration was of the opinion that the carrying on of the said sideshow would interfere with the peace and quiet of the persons living in the vicinity of Evans's section.

" 4. The Council being charged under the Municipal Corporations Act, 1933, and otherwise with the good order and government of the Timaru Borough, considered that it was entitled to refuse the application for an amusement license, as it regarded the land on which the sideshow would be carried on as unsuitably placed for the carrying on of such sideshow."

My attention has not been directed to any particular provision under the Municipal Corporations Act or otherwise which would give the Council authority to refuse the application and override the definite provisions of the Schedule.

It seems clear that, if appellant complies with the conditions set out in the Schedule, he is entitled to his license, and that the Council's refusal thereof is without legal sanction.

Appellant is entitled to redress.

It is ordered that respondent grant the application of appellant dated December 18, 1946, and that respondent pay costs of appellant £5 and disbursements.

Appeal allowed.

Solicitor for the appellant : *D. J. Hewitt* (Christchurch).

Solicitors for the respondent : *Perry, Hudson, and Gresson* (Timaru).

[IN THE COMPENSATION COURT.]

SMITH v. THE KING.

COMPENSATION COURT. Wellington. 1946. September 9, 30. 1947.
August 8. ONGIEY, J.

Workers' Compensation—Accident arising out of and in the Course of the Employment—Coronary Thrombosis—Evidence that Deceased Worker had Coronary Artery Disease and Died therefrom—Onus of Proof that Death resulted from Effort—Workers' Compensation Act, 1922, s. 3.

Where, in an action for compensation by the widow or representative of a deceased worker, the evidence proves that the deceased had coronary artery disease, and that death resulted from that disease, there is a known cause (disease) for what happened, and it is for the plaintiff to prove circumstances leading to an inference that death was in fact premature, or was in some way inconsistent with the usual course of disease.

Where the evidence does not show that the death of deceased resulted from effort, the Court cannot find that the death of deceased resulted from his work.

ACTION claiming compensation under the Workers' Compensation Act, 1922.

The suppliant was the widow of Leslie Robertson Smith of Westport, railway ganger, who died at his home on Sunday evening, September 16, 5 1945.

The deceased had coronary artery disease. He had that disease for some time, and, according to the evidence, he had heart attacks at work from time to time from June 14, 1945, onwards. Three occasions were referred to in the evidence: the first, on June 14, when 10 pulling sleepers with a pick; the second, on August 22, when assisting to shift a crossing; and the third and last, early in September, when assisting loading a hut. The date in September was not fixed, but it was before September 7 and probably on September 3, 4, or 5. In her petition, suppliant alleged that on or about June 14, 1945, the 15 deceased was engaged in work involving continuous and strenuous physical effort, that periods of the work required exceptional physical effort on the part of the deceased, and that, while doing that work, he injured his heart. The petition continued:

The said accident aggravated a pre-existing diseased condition of the deceased 20 heart, and because of the injury sustained thereby and of the nature of the work subsequently done by him the death of the said deceased on September 16, 1945, was premature and resulted from the condition of his heart.

That based the claim primarily on what happened on or about June 14 (the sleeper-pulling work), but at the hearing the petition was amended 25 by adding the following:

That early in September, 1945, and while deceased was engaged in moving railway huts near Mawheraiti, the effort and strain exerted by him caused damage to his coronary arteries and was a precipitating factor of his death on September 16, 1945.

30 That referred to the hut-loading work. The incidents referred to are the first and third of those occasions when the deceased had heart attacks at work. The deceased died some eleven to thirteen days after the third attack. There was no post-mortem examination. Dr. C. H. Thomson saw the deceased about half an hour before deceased died.

Dr. Thomson said the deceased was then far too ill to be troubled with inquiries relating to medical history. So far as the evidence shows, deceased had not consulted any other doctor. At the trial, Dr. Morvyn Williams of Wellington was called for the suppliant and Dr. P. P. Lynch of Wellington for the Crown. They formed their opinions on what they deduced from the evidence. Dr. Thomson supplied particulars for the death certificate. To the best of his recollection, these were as follows :

(a) "Myocardial degeneration—months." (I deduced this from my general medical knowledge and experience and not from any statement made to me by the deceased.) (b) "Coronary thrombosis—one week."

Dr. Thomson said :

I was satisfied that the deceased suffered from acute coronary insufficiency. I do not feel confident to express an opinion as to what was the cause of this. In stating that death was due to coronary thrombosis I was referring in a general term to death due from coronary insufficiency. This is the usual term in such cases. I agree, however, that I am unable to say what was the final and terminal event which caused the collapse and death. In my opinion, however, the deceased suffered from an infarct of the heart which had formed at least a week or so earlier and since then had gradually enlarged. If the deceased as a fact had been suffering pain over a period of some months and if I had been aware of that fact, in providing particulars for the certificate of death I would not have written "Coronary thrombosis—one week," but "Coronary insufficiency."

His evidence was given by affidavit. Dr. Thomson distinguished coronary thrombosis and coronary insufficiency. Had he known the history, he would have regarded this as a coronary insufficiency case. Coronary insufficiency due to effort came on at the time of effort, and normally brought about its effects (whether death or otherwise) at that time. It would therefore require an explanation to connect death on September 16 with coronary insufficiency on or about September 3, 4, or 5. In the absence of an explanation of the delay, death due to coronary insufficiency was inconsistent with suppliant's case. (Dr. Thomson was not called as a witness.)

Blundell, for the suppliant. On the facts, this case comes within *Tansey v. Renown Collieries, Ltd.*(1). Even if this Court holds that the onus does not move to the respondent, the balance of reasonable probabilities is that the work on which the deceased was engaged from June, 1945, onwards caused or materially contributed to his premature death. The test is whether incapacity or death has been accelerated or materially contributed to by the injury or any other physiological change which may be attributed to the work.

Kitchingham, for the Crown. The onus of proof lies on the suppliant because death or collapse did not occur while the deceased was actually pursuing his employment. Here, there is no satisfactory link between any of the incidents and the death.

Blundell, in reply.

Cur. adv. vult.

ONGLEY, J. [After stating the facts, and setting out parts of the medical evidence, as above:] Suppliant does not accept or rely on coronary insufficiency as the cause of death. Her case is that death was due to coronary thrombosis; that the first effort caused intimal haemorrhage; that the third effort caused a further intimal haemorrhage and thrombosis. That view does not conflict with the delay, but raises the question whether effort can cause coronary thrombosis and whether it did so in this case. The Crown case is that it is immaterial whether

(1) *Ante*, p. 122.

death was due to coronary thrombosis or coronary insufficiency, because both result from coronary artery disease (which deceased had) in the normal course of that disease, and that death resulted from disease in this case. There is, however, this to be said : that coronary thrombosis usually results from disease, and does not usually result from effort. (One school of thought says it never results from effort.) Suppliant's case is, therefore, that the unusual happened in this case. Dr. Williams takes the view that it was coronary thrombosis in this case. Dr. Lynch does not contest it, but says very little depends upon whether the actual cause of death was coronary thrombosis or merely coronary narrowing.

The deceased was examined by a New Zealand Military Forces Medical Board on December 14, 1942. That is two years and nine months before his death. He was graded : "Three. Fit for Home Guard. "Not fit for camp." Causes for this grading were stated as : "(i) Plantar callosities. (ii) Myocarditis." Dr. Williams interprets this medical record as follows :—

First there is the medical record from the army, dated 1942, in which deceased is stated to have had some clinical evidence of arterial disease. The evidence, so far as I could make it out, was that his systolic blood pressure was rather high but not excessively so, and that he had a murmur in his heart. He was graded 3, but apparently no reason was offered him for this and he made no further enquiry. The inference to be drawn from these findings is, I think, merely that deceased was arteriosclerotic and the implication of this was that he would be a likely sufferer from coronary disease which was, of course, subsequently shown to be so. Apparently at that time he had no cardiac symptoms and did not at any stage seek medical advice concerning his heart.

Dr. Lynch says :

I understand from the records of his military service that when he was thirty-nine years of age he was examined by a medical board. It was found that he had a rather high systolic blood pressure and a rather low diastolic. He was also regarded as having a heart murmur and it is possible that there may have been something in his general appearance to cause the medical board to regard him as being not fit for active service.

It is now necessary to examine the occasions of the three heart attacks (but particularly the two on which suppliant relies) to see what deceased was actually doing and what effect it had on him. Details of the first occasion are given by Mr. James M. Wall as follows :—

I was a member of his gang for about two years. The work of the gang was mainly resleepering and relaying. That was regarded as a heavy type of work. The tools we use for that work are crowbars, hammers, picks, and shovels. The work is particularly tough at periods. Putting in the break, relaying the track between trains, is hard work—it is called "the mad hour." Smith did his share of the work. He was in charge. In June, 1945, we were working the other side of Maimai.

Mr. Wall goes on to describe the exact work being done by deceased at the time deceased suffered pain and its effects as follows :—

He was pulling in sleepers over the new rails with a pick. He would drive the pick into the sleeper to do this. He passed a remark that he had strained his tucker. He put his hand over his heart at the same time. I did not take much notice of his appearance at the time, but he remained on the job. I cannot say if he had a rest at the time; he may have. I think he complained to me that evening again. I think at the time he said he was not feeling too well, and I said, "Have you got indigestion?" and he said, "No, it was a strain." I am not sure if it was that day or a little after that he said he could not use a pick because it used to affect him. He did not say where it affected him, but I took it to mean his heart.

Details of the second occasion are given by Mr. James Brady. They are as follows :—

I remember deceased, he was foreman of my gang. He was in the habit of working himself, a great worker, always giving the gang a hand. The first I knew of anything being wrong with him or hearing a complaint was the day we put the crossing in at Maimai. That was August 22, 1945. It was a railway-crossing. It is a big lift. It is one piece of rails and sleepers dogged and put together. The length would be 84 ft. It was manoeuvred into position with crowbars. About a dozen men would be on that job. Deceased gave us a hand with that. I was beside him and saw him working. He was using a crowbar. We were levering it into position, and when he started to lift he dropped the bar, put his hand to his side, and said, "That's it." I saw an alteration to his condition afterwards. That seemed to be the finish of him for the day. He went for a walk. It was half an hour from lunch time. 5 10

The suppliant did not direct her case towards this second occasion, and the medical evidence did not attach any weight to it.

Details of the third occasion are given by Mr. Brady and by Mr. Wall. Mr. Brady said : 15

I was present when the huts were being loaded. That was some time in September. I did not go to Reefton with them. The huts were pulled on to the trucks with ropes. Smith started helping with that, but he was not feeling too well and left it to us. He told me he was not well. I was not working with him during the last week. When he said he was not well, he said it was his heart. He had not been doing his usual work from the lifting of the crossing to the moving of the huts. He never was the same man. 20

On cross-examination, he said :

All the work is done by pulling on the ropes. You use crowbars first before pulling the ropes. Deceased started to lift the hut with the crowbar and then to pull on the rope. He left the loading of the huts to us after the first one was loaded. He had a hut of his own and went in and out of it. On that occasion he just said he was not feeling too well ; he was not well. He was on the job every day between June and the time he died in Westport. During that time he seemed to lose all interest in the work. He would give a hand with light lifts, but after the crossing incident at Maimai he lost all interest in the work. The last heavy lift I saw him do was loading the huts at Mawheraiti. That was fairly heavy work ; fairly solid. Between the crossing incident and loading the huts he did not do any physical work. 25 30 35

Mr. Wall said :

We shifted camp from Mawheraiti to Reefton early in September. Loading the huts on to trucks was the main work. They were jacked on to the skids or by use of crowbars. They were then pulled and pushed on to the trucks. Deceased took part in that work for some of the time. He passed a remark that it was the last time he was going to load huts until the Department supplied rings and block and tackle to pull the huts on to the trucks. I am not sure which day it was he said that, but it was after we started loading the huts. I do not think he was doing anything at the time. 40 45

On cross-examination, he said :

Up to the time of shifting huts he had not been sitting down all the time. Perhaps for a week or fortnight before the huts were shifted he did not do very much. Prior to that he had given a hand where needed. I do not know if a ganger is expected to give a hand in the physical work, but our gang was always short-handed and deceased did give a hand if necessary. 50

As to the first occasion, Dr. Williams says :

The evidence of the events on June 14 does not strike me as being as comprehensive as it might be. There can be no doubt that on that date deceased for the first time in his life and concurrently with heavy exertion developed cardiac pains. This much we do know. We cannot say from the available evidence whether or not that pain was persistent for a matter of some hours. In other words, we cannot say that the symptoms as known to us are suggestive that he developed a cardiac infarct on that date. But at the very least we do know that as and from the events of that day he suffered from angina of effort. There is evidence that he complained of symptoms from time to time between June 14 and the period in early September which marks the next stage in his illness. The symptoms as described were definitely related to effort, and the impression I obtained from 55 60

reading the evidence was that there had been some deterioration in deceased's health generally.

The suppliant said :

5 I remember him coming home in June, 1945, and making a complaint that he was not feeling very well. He said he had been doing some heavy lifting. He said he had been lifting a crossing they had been putting in. He was not laid up at the time. He said he thought he had strained his heart, but was not too sure. He went back to work as usual on the Monday and continued to come home every week-end.

10 On cross-examination, she said :

June, 1945, was the first time my husband made complaints about having strained himself. From June he worked up to the Friday before his death. During that time he consulted no doctor up to the Sunday night when he died. He complained to me about hurting himself when pulling heavy sleepers. It was after 15 lifting the crossing that he complained about pulling sleepers.

The suppliant's evidence seems to put the sleeper-pulling incident (the first incident) as occurring after the crossing-shifting incident (the second incident), and it may be she confuses what was said on these occasions. Dr. Williams does not refer to the crossing-shifting incident, except 20 generally as showing symptoms of which deceased complained. Dr. Lynch refers to it only in the same way. It is not regarded by Dr. Williams or Dr. Lynch as a cause or factor in the death of deceased. The third occasion or incident is the hut-loading. Crowbars are used to get the huts on to the skids, then the huts are pulled and/or pushed 25 on to the trucks. Mr. Brady says :

Smith started helping with that, but he was not feeling too well and left it to us. He told me he was not well.

On cross-examination, he said :

On that occasion he just said he was not feeling well.

30 The deceased does not appear to have complained of pain on that occasion. It seems he was not feeling well enough to work. Mr. Brady says deceased had not been doing his usual work since the crossing incident. The impression I get is that deceased was an ill man that day and did very little physical work. Mr. Brady says when he (deceased) 35 was not well, he said it was his heart. Dr. Williams takes the case in three stages. His first stage is up to and including the sleeper-pulling incident. As to that, he says :

We can say with absolute certainty that stage 1 represented a phase in which angina of effort was undoubtedly present. This angina commenced apparently 40 quite suddenly and dramatically during a definite physical act and was repeated on subsequent occasions during heavy physical exertion while at work . . . If we consider the first stage as angina of effort, it should be realized that this condition is one essentially of a partial coronary insufficiency. This stage of angina of effort is basically due to atheroma of the coronary arteries. It may be purely 45 the result of progressive atheromatous degeneration until a point is reached at which the coronary vessels are so narrow that they are incapable of transmitting sufficient blood for the immediate cardiac demand. But it may also be initiated by a sub-intimal haemorrhage in a coronary artery, the result of one particular effort or, in some cases, a cumulative effect of repeated effort. In its essential pathology 50 the condition is really the same as the case of coronary occlusion the result of effort. The difference is one of degree only. For instance, it is possible to have total occlusion of a coronary artery from a large subintimal haemorrhage without any coronary thrombosis; conversely, it is possible to have no impairment of the bore of the artery in the presence of a small subintimal haemorrhage. Naturally all grades of obstruction are possible. Two well-known authorities in the U.S.A. 55 (Boas of Mt. Sinai Hospital, and Blumgart, as Associate Professor of Medicine at Harvard University) state that effort can initiate the syndrome of angina of effort in this way. It is, after all, a view which is entirely in keeping with the present overall view relating to subintimal haemorrhage and its relationship to coronary

involvement brought about by effort. To draw an analogy, it is one more stone in the pavement. Therefore I think it quite logical to assume that deceased, as from June 14, 1945, and resulting from the effort sustained on that date, developed a partial coronary obstruction due to a subintimal haemorrhage.

On cross-examination, he said :

I would think that, could a fuller history have been obtained, especially regarding the origin of his symptoms in June, 1945, we might have even been able to establish a major cardiac disaster at that time ; that is my impression on reading the evidence.

It is not in dispute that deceased's heart was in such a condition that he would suffer angina of effort, nor is it in dispute that he did suffer angina of effort when pulling the sleepers. What is in dispute is whether that effort caused or precipitated a coronary breakdown. My understanding of Dr. Williams's evidence is : (i) That the June incident shows angina of effort. (ii) That from the known evidence it cannot be said that it caused a cardiac infarct. (iii) That, if a fuller history had been obtained, it might have shown a major cardiac disaster. Dr. Williams, on a consideration of the evidence and the authorities, says :

Therefore I think it logical to assume that deceased, as from June 14, 1945, and resulting from the effort sustained on that date, developed a partial coronary obstruction due to subintimal haemorrhage.

Dr. Williams appears to make that assumption. That is shown by his evidence of the September incident where he refers to a "further subintimal haemorrhage." This evidence will be referred to later. Dr. Lynch said :

I believe that the sole effect of the exertions referred to was to indicate to the deceased that his heart muscle was affected by the disease in the coronary vessels and was now no longer able to cope with the demands which were being placed upon it. In other words, what Mr. Smith was complaining of from June onwards was angina of effort.

The evidence shows angina of effort resulting from the June incident, but it does not show more than that. Dr. Williams thinks that a fuller history might have shown more. He suggests a partial coronary obstruction, and he may be right, but, in the absence of the fuller history, I am not able to go beyond what the available evidence shows and not able to say that a partial coronary obstruction or other breakdown was initiated, because there is no evidence to show it. The evidence shows angina of effort, but it does not show more than that. Dr. Williams does not say that the evidence shows more than that. The fact that the pain abated and deceased went on with his work shows that it did not then cause a breakdown. The fact that he continued to work without complaint until the crossing incident tends, if anything, to show that no breakdown had been initiated by the sleeper-pulling work. On the available evidence, I cannot find that the death of deceased was caused or precipitated by that incident. That leaves the September incident for consideration as a precipitating factor in the death of the deceased. As to that, Dr. Williams says :

Considering the statements of Dr. Thomson, Mrs. Smith, and fellow-workmen, there would appear to have been a definite turning-point dating from the hut-removal incident in early September. For instance, Dr. Thomson has stated (and has confirmed in personal communication to me) that deceased suffered constant and increasing pain for at least a week prior to his demise. Suppliant's statements indicate a definite drop in health from the time when he came home following removal of the huts and that his health remained in this depressed state until his demise. Deceased himself stated to her that removal of the huts had upset him, especially the removal of one particular hut . . . When we turn to the incidents of early September, it is, I think, apparent that some further radical pathological change occurred in his coronary arteries. We have the picture of a man already suffering from angina of effort. We then have the picture of a man

following a further effort, and it must be remembered that in the times preceding this incident he had been taking things as quietly as possible. The likely explanation of his final phase is, in my opinion, that the effort of moving the hut caused him a further subintimal haemorrhage sufficient to cause more marked coronary obstruction than that from which he had previously suffered and sufficient to initiate a process of terminal coronary thrombosis. On such a basis we can explain the continuity of pain and persistent loss of health in the final phase of his illness, and it is easy to visualize that during that period a growing, spreading thrombus formed in his coronary circulation which finally resulted in his death. As regards degree of effort in its relationship to these events: It might be argued that what this man was doing on the various occasions on which he complained of cardiac symptoms was merely his normal accustomed work. There is, I admit, a certain truth in this, but that does not alter the fact that any man performing heavy physical exertion, no matter what his degree of training and aptitude for that particular work, invariably sustains a rise in blood pressure and an increase in his cardiac output as the result of that effort. . . . So far as the natural progress of the disease is concerned, it has to be admitted, as previously said, that the symptoms could theoretically occur at any time, but the sequence of events in this case is so striking and dramatic that the only inference possible, apart altogether from the purely scientific background, is that there must be cause and effect. Another point which should be mentioned is this. It has been stated, and is accepted by many people, that coronary occlusion very frequently occurs at rest. This is undoubtedly, but to argue from this that it is completely unrelated to exertion is fallacious. There has been considerable divergence of opinion among the authorities as to the relative importance or unimportance of effort in relation to coronary seizures, but certain writers, notably Boas, Blumgart, Patterson, Morgan, and others, emphasize the importance of effort as a factor in precipitating coronary symptoms. . . . I think the incidents in September are not a coincidence. I think the sequence of events there is more than suggestive, in fact makes it highly probable that the effort of moving the hut initiated the terminal phase of the illness. . . . I regard this not as angina of effort, but pain of another character suggesting coronary occlusion. If there be any doubt as to whether the effort in June caused some physiological change, the known events in September caused some very definite physiological change.

35 On cross-examination, Dr. Williams said :

From all I know about this case, the pain in August would be anginal pain, but I consider the pain in September was a different type of pain, in the sense that it was more persistent. . . . From my reading of the evidence, the initiation of the thrombosis would appear to date from the shifting of the huts, and in particular one hut.

Dr. Lynch's opinion that from June onwards deceased was complaining of angina of effort has already been quoted. Dr. Lynch also said :

I cannot see that the work which he was doing in the weeks or months before his death had any relation to the onset of the coronary thrombosis which caused his death. The incidents referred to in June and August, even if they are given their full value, do no more than indicate that some four or five months before his death from coronary thrombosis there was evidence of coronary insufficiency. The deceased's unwillingness to exert himself, his distress when he did so, his remark that he had "strained his heart," the change which his wife noticed in his general health, his reluctance to do small jobs about the house are all part of one picture: that of a man with defective coronary circulation, a candidate for sudden death, and soon to die from a common and much-to-be-feared complication of coronary disease—viz., coronary thrombosis. . . . I heard Dr. Williams's evidence, and he drew attention to the fact that there is a body of medical opinion who believes the process of coronary thrombosis can sometimes be initiated by haemorrhages into the base of an atheromatous plaque. As explained this morning, I do not disagree with that view. I think in only a very small proportion of cases is the process of thrombus in a diseased artery initiated by an intimal haemorrhage. Smith was under no obligation to continue what he was doing if it elicited pain, and I gathered from the evidence of his workmates that he refrained from doing jobs he had previously done for the reason that they caused pain and distress. There was no special circumstance of emergency or danger associated with any of the lifts referred to, and there did not seem to me to be anything in the nature of his work or in the two or three incidents referred to which could have had any influence on the natural progress of the disease. At no time

was he disabled. I think, if the suggestion of Dr. Williams that one or even more of these lifts had occasioned an intimal haemorrhage were correct, that would have been followed by disablement. If you consider the condition of a plaque which is projecting into the coronary artery and narrowing the lumen, I think even a small haemorrhage in such a plaque would cause disablement.

On cross-examination, he said :

I assumed the process of thrombosis was commencing about a week before death. I attach importance to the only medical evidence available about deceased —i.e., Dr. Thomson's. In assuming the thrombus formed about a week before death, I say that because Dr. Thomson says the pain commenced about a week before death. On the week-end before the week-end of his death, he was up one night. That may have been the commencement of the thrombosis, but the following week he was well enough to go to work and worked until the Friday. That is against the existence of a thrombus. I would not dispute that the thrombus may have been present a week or eight days prior to death. I would say during that time the process of thrombosis was continuing. Taking into account that he died and death was preceded by a week in which his symptoms were worse than they had been before, then I think you could make predictions as to what would be found at post-mortem if there had been one. If you can fix the period of change from occasional pain to continuous pain, that is important . . . I agree you can have cardiac trouble form as a result of effort without incapacitating the person immediately. Deceased could have had a subintimal haemorrhage in June, 1945, without being incapacitated at the time. The only significance I attach to the sequence of effort and pain three times is that it indicates the presence of coronary insufficiency.

It seems that deceased died of coronary thrombosis. There are two sharply divided schools of thought on the question whether effort can cause coronary thrombosis. The new school of thought holds the view that strenuous and unusual effort can cause coronary thrombosis if the coronary arteries are diseased : *Tansey v. Renown Collieries, Ltd.*(1) and *O'Neill v. The King*(2). Deceased's coronary arteries were diseased. Dr. Williams says :

Disease tends to increase. The actual rate of progress of the disease is unpredictable in any individual.

Death from that disease can be expected, and, if it occurs, it will usually occur because a clot has formed in the coronary artery system (coronary thrombosis). Suppliant's case is that the work, particularly the two incidents referred to in the petition, affected the course of the disease by bringing about death prematurely—in effect, that the work caused subintimal haemorrhage and so caused the clot to form, or at any rate sooner than it would have formed by the disease alone. Dr. Williams supports that view. He does so because he deduces from the evidence that there was a definite turning-point at the time of the hut-loading incident and that the likely explanation is that that effort caused a further subintimal haemorrhage. That presupposes (i) that there was subintimal haemorrhage at that time, (ii) that effort can cause subintimal haemorrhage, (iii) that this effort was sufficient to cause, and did cause, it, (iv) that the change in deceased's condition was not due to the progress of the disease. Dr. Williams relies on the statements of Dr. Thomson, the suppliant, and the fellow-workers. Dr. Lynch takes the view that the evidence shows nothing more than the ordinary progress of the disease. The evidence must, therefore, be examined carefully. Dr. Thomson says the deceased was too ill to be worried with inquiries about medical history ; that deceased told him he had severe pain in the chest which commenced about a week previously ; that it had been continuous from then and had gradually got worse. According to that, the pain had come on about a week previously (the hut-

(1) *Ante*, p. 122.

(2) *Ante*, p. 200.

loading incident was eleven to thirteen days previously), and it does not appear that deceased connected it with the hut-loading. I am not disposed to attach particularity to Dr. Thomson's evidence, because at the time his concern was to give treatment, not to get medical history.

5 However, it cannot be accepted as evidence that the pain began at the time of the hut-loading, or that deceased connected it with the hut-loading. Suppliant's evidence is that deceased told her he was very sick after the incident; that he was quieter and did not seem to be quite as well; that he did not do his usual week-end gardening work; 10 that he continued to work; that she was not alarmed about him. Deceased "did not seem to be quite as well," but not sufficient to cause alarm. That indicates some worsening of deceased's condition, but not such a serious worsening as to lead to an inference that deceased had damaged his heart, especially when considered in conjunction with the 15 evidence of Mr. Brady and Mr. Wall (deceased's workmates) as to his condition for the fortnight before the hut-loading. As to that, Mr. Brady says:

He had not being doing his usual work from lifting the crossing. Between that and the loading he did not do any physical work. He started helping, but 20 was not feeling well and left it to us.

Mr. Wall says:

Up to the time of shifting the hut, he had not been sitting down all the time. Perhaps for a week or a fortnight before the huts were shifted he did not do very much.

25 That evidence does not show that he did any strenuous work at the hut-loading, but does show he was in a bad way for a fortnight before it. At the previous incident (the crossing-shifting), "when he started to lift he dropped the bar" (Mr. Brady). It seems that at that time he was not fit to do physical work. The evidence does not show what 30 he actually did at the hut-loading. Mr. Wall says "he took part in it," but, in view of his experience at the crossing-shifting and the fact that after that "he did not do very much" (Mr. Wall), it is unlikely he did anything strenuous at the hut-loading. The fact is he said he was not well and left it. The evidence does not show strenuous effort at the 35 hut-loading. Having regard to his condition before the hut-loading, there was not such a marked change after the hut-loading that an inference can be drawn that that work injured his heart and caused him to die prematurely. That is how Dr. Lynch views it. Mr. Brady says he saw an alteration in deceased's condition after the crossing 40 incident. He makes no reference to any alteration after the hut incident. Mr. Wall does not say anything from which it can be inferred that he noticed any particular worsening of deceased's condition after the hut incident. On the evidence, deceased died of coronary thrombosis. That may have been due to subintimal haemorrhage and it may not. 45 There is no evidence to show, but it is usually due to disease, not to effort. If there was subintimal haemorrhage, there is nothing from which it can be inferred that effort caused it (assuming that effort can cause it).

It is submitted for suppliant that, in the circumstances, the onus is 50 on the Crown to show that the work did not cause premature death. The deceased had coronary artery disease. Death from coronary thrombosis results from that disease. Death from coronary thrombosis resulted here. There is thus a known cause (disease) for what happened. The suppliant says that the known cause was displaced here by the 55 intervention of effort bringing about a premature death. It is for the

suppliant to prove circumstances leading to an inference that death was in fact premature or was in some way inconsistent with the usual course of disease. That has not been shown. What has been shown is that deceased had heart disease and that at times he got heart pain when he made an effort (the sleeper-pulling work and the crossing-shifting work), and that he was not able to do the work and gave up at the hut-loading incident. These incidents show that, by reason of the disease, the deceased could not do the work. They do not show that the effort had any effect on the progress of the disease, or that it brought about the death of deceased, either prematurely or otherwise. The cause of death was coronary thrombosis (that is suppliant's case). There is nothing to show it resulted from effort. Suppliant does not rely on coronary insufficiency, but, if that was the cause, the delay of some eleven to thirteen days is not accounted for. There does not seem, to be any real basis for saying that the work caused premature death. It all depends on the inference drawn by Dr. Williams that "There would appear to have been a definite turning-point dating from the hut incident." Deceased seems to have carried on for the fortnight (about) after the hut incident much as he did for the fortnight before that incident. Dr. Williams does not put it on firmer ground than that "it would appear." I have got to go further and say (i) that it did happen then, and (ii) by reason of the work. I feel it is too uncertain to enable me to make either of those findings. The deceased did not connect his pain or his breakdown with the hut-loading, except that he said he was sick after it. His workmates did not notice any material change in him. There is thus only what suppliant noticed—i.e., that he was quieter and did not seem so well after it; that he did not do his usual week-end gardening after it. Against that, there is the fact that he had not been doing much work on the job for a fortnight before the hut-loading incident and that the disease was progressing. I therefore find that it has not been proved that the death of deceased resulted from his work. I reserve leave to respondent to apply for costs.

Judgment for the Crown.

Solicitors for the suppliant: *Bell, Gully, and Co.* (Wellington).

Solicitor for the respondent: *F. A. Kitchingham*, Crown Solicitor (Greymouth).

PAGE v. AUCKLAND TRANSPORT BOARD.

COMPENSATION COURT. Auckland. 1947. May 8; August 8. ONGLEY, J.

Workers' Compensation—Assessment—Lump-sum Compensation—Non-Schedule Permanent and Partially-incapacitating Injury—Suitable Employment provided by Employer at Lower Rate than earned before Accident—Basis of Assessment—Workers' Compensation Act, 1922, s. 5 (6)—Workers' Compensation Amendment Act, 1936, s. 6—Workers' Compensation Amendment Act, 1943, s. 3 (1).

Where a worker suffers an injury that is permanent and partially incapacitates him, but is not a Schedule injury, and his employer provides him with suitable employment at a lower wage rate than he was earning before the accident, he is not entitled to a lump sum calculated on a Schedule injury basis, or, alternatively, to a lump sum calculated on the basis that he is a light-work man able to earn less than the wage the employer is paying him for the employment provided.

The Court cannot depart from the basis provided by s. 5 (6) of the Workers' Compensation Act, 1922 (as amended by s. 6 of the Workers' Compensation Amendment Act, 1936, and further amended by s. 3 (1) of the Workers' Compensation Amendment Act, 1943), for weekly payments while suitable work is provided for the worker by the employer, unless both parties ask for it or some unusual special circumstances justify it. Any lump-sum payment, in circumstances which in the present case were held not to be special or unusual, must be on the basis provided by that subsection.

ACTION claiming compensation under the Workers' Compensation Act, 1922. There was no dispute on the material facts.

Plaintiff was employed by the defendant as a tram-conductor, and on or about April 6, 1944, while he was pulling down a trolley-pole, the rope came away, with the result that plaintiff fell and injured his right leg. He was totally incapacitated for work until July 28, 1946, and was then re-employed by the defendant Board at its Epsom Depot, plaintiff said, as a janitor; the Board said as a cleaner. He was still employed there in that job. His earnings at the time of the accident were £7 9s. 4d. per week. His present wages were £6 3s. 4d. per week. Plaintiff was paid 119 weeks' compensation (£535 10s.).

Haigh, for the plaintiff.

North, for the defendant Board.

Cur. adv. vult.

15 ONGLEY, J. The plaintiff's injury is permanent; that is agreed. It is agreed that it is not a Schedule injury and that it amounts to 70 per cent. of the loss of the leg. Plaintiff asks for a lump sum calculated on a Schedule injury basis as for 70 per cent. of the loss of the leg, or, alternatively, for a lump sum calculated on the basis that he is a light-
20 work man able to earn only £3 7s. 6d. to £4 per week. In support of this view, counsel for plaintiff says that, in awarding a lump sum, the Court should disregard the actual wages, because the job is a benevolent one, and because plaintiff would have no chance in the ordinary labour market of getting a job of that nature.

25 Counsel for the Board submits (i) that plaintiff is not entitled to a lump-sum payment, and (ii) that, if he wants a lump sum, it should be based on his present wages. He says that the Board's practice is to find jobs such as this for its injured workers. He points out that this is not a Schedule injury entitling plaintiff to a lump sum, and refers to
30 subs. 6 of s. 5, which, as amended by s. 6 of the 1936 Amendment Act and further amended by s. 3 (1) of the 1943 Amendment Act, provides:

Except as provided in section nine hereof, during any period of partial incapacity the weekly payment shall be an amount equal to sixty-six and two-thirds per centum of the difference between the amount of the worker's weekly earnings at the time of the accident and the weekly amount which the worker is earning
35 after the accident in any employment or business, or is able to earn in some suitable employment provided or found for him after the accident by the employer by whom he was employed at the time of the accident, but not exceeding in any case four pounds ten shillings a week.

40 He submits that that subsection has the effect of calling upon the Board to find the job and to pay compensation in accordance with the job it finds. Counsel for plaintiff points out that plaintiff at the end of the six years' compensation period will have no further claim on the Board.

and the Board can then please itself whether it finds a job for him or not. Counsel for the Board says the Board has done its duty under the Act and found a job, and should not have to pay twice—i.e., the wages it is paying plus compensation on the basis that it is not paying those wages. These arguments bear on the matter to the extent that, if there is more than one interpretation or more than one course open, the one that will not work an injustice should be selected. Counsel for plaintiff cites *Bolland v. Levin and Co., Ltd.*(1), *In re Stewart, Ex parte Steel Ships, Ltd.*(2), *Dobson v. Maling and Co., Ltd.*(3), and *Mason v. William Cook and Sons, Ltd.*(4). Counsel for defendant cites *Lammas v. Manawatu County*(5), *Phillips v. Wellington City Corporation*(6), *Hurrey v. The King*(7), *Fairman v. Grey Valley Collieries, Ltd.*(8), *Macdonald's Workers' Compensation in New Zealand, Supplement No. 9, 94, paras. 816, 817, Bolland v. Levin and Co., Ltd.*(9), *Joyce v. Peter Graham and Son, Ltd.*(10), and *Chapman v. The King*(11).

The Act makes a distinction between Schedule and non-Schedule injuries. That, I think, indicates that a different basis of compensation is intended. This is a non-Schedule injury. Again, the Act in s. 6 (3) provides a basis when a lump sum is awarded—*Lammas's case*(12)—and in s. 6 (5) provides the basis for weekly payment for partial-incapacity cases. This is a partial-incapacity case, and I think that the weekly basis of payment provided for these cases must be applied, unless some special circumstances justify a lump sum being ordered. It must, however, be recognized that, if a lump sum were ordered on the basis of the present job, the plaintiff would suffer an injustice if he lost the job and could not get another as good. No doubt it would be better for plaintiff to deal with his case on a Schedule injury basis. The answer is that it is not a Schedule injury case. No doubt, also, it would be better for plaintiff to fix a lump sum and to do so not on the basis of the present job, but on the basis that he will lose that job and have to accept another at less wages. I do not think the matter can be tested that way—that is to say, I do not think the test is what is best for plaintiff or what is best for defendant. I think the Act has laid down the basis for each case—that is to say, for Schedule injury cases, for weekly payment cases, and for lump-sum payment cases—and I think that this Court must observe what the Act has laid down. The only question that arises is whether the Court should resort to the lump-sum provisions and so get away from the weekly payment provisions. That would be better for plaintiff, but equally it would not be better for defendant. I do not think the Court can depart from the basis laid down by the Act for weekly payments while suitable employment is provided or found for the worker by the employer, unless both parties ask for it or some unusual and special circumstances justify it. In this case, the defendant Board has provided a job and is willing to pay compensation on the basis laid down by the Act—i.e., 33½ per cent. of the difference between the amount of the worker's weekly earnings at the time of the accident and the amount which the worker is earning in the employment provided for him. The Board does not object to a lump sum being fixed on that

(1) [1944] N.Z.L.R. 689.

(2) [1947] N.Z.L.R. 134.

(3) [1947] N.Z.L.R. 123.

(4) [1946] N.Z.L.R. 214.

(5) *Ante*, p. 1.

(6) (1940) 4 N.Z.L.G.R. 12.

(7) [1943] N.Z.L.R. 278.

(8) [1943] N.Z.L.R. 368.

(9) [1944] N.Z.L.R. 689.

(10) [1945] G.L.R. 399.

(11) [1943] N.Z.L.R. 103.

(12) *Ante*, p. 1.

basis, but does not consent to a lump sum being fixed on some other basis which would impose a greater liability on the Board. There are not special or unusual circumstances in this case. The basis of the claim is that it would benefit the plaintiff to award a lump sum and fix
5 the amount in the way, or either of the ways, suggested—that is, on a Schedule basis or on a basis that puts plaintiff's earnings at less than he is getting. I cannot agree that the Court is entitled to do that while plaintiff is in the job and getting the wages. To do so would be fixing his compensation on the basis that he is not getting the wages he is in
10 fact getting. The Act fixes what plaintiff is entitled to and what defendant is to pay—i.e., 66⅔ per cent. of the difference in earnings. I give judgment accordingly. On the figures supplied, it seems that plaintiff was out of employment for 120 weeks and three days after the accident. It may be that he was totally incapacitated for that period.
15 He was paid full compensation for 119 weeks. If any adjustment is required for that, the parties can no doubt make it. They will also be able to fix the amount due for the weekly payments on the basis of 66⅔ per cent. of the difference in earnings. In the circumstances, I do not fix a lump-sum payment. Any matter requiring adjustment can be
20 referred to the Court if the parties are not able to agree on it. I allow plaintiff £10 10s. costs. If plaintiff is entitled to witnesses' expenses, counsel will no doubt agree on these. Failing agreement, they will be fixed by the Registrar.

Solicitor for the plaintiff: *F. H. Haigh* (Auckland).

Solicitors for the defendant: *Earl, Kent, Stanton, Massey, North, and Palmer* (Auckland).

[IN THE MAGISTRATES' COURT.]

BROWN *v.* PAYNE AND DAVIS.

1947. May 20, 28, before Mr. J. H. LUXFORD, S.M., at Auckland.

Industrial Conciliation and Arbitration Acts — Wrongful Dismissal of Employee—Employee taking Part in Activities of his Industrial Union —Employer's Absolute Liability — Defence available — Industrial Conciliation and Arbitration Amendment Act, 1943, s. 2.

The effect of s. 2 (1) of the Industrial Conciliation and Arbitration Amendment Act, 1943, is to impose an absolute liability on any employer who dismisses a worker to whom the subsection applies, unless the employer establishes the defence referred to in the proviso to that subsection—namely, that the worker was dismissed or his position was altered for a reason other than that the worker had acted in any of the specified union or industrial activities, or was entitled to claim any such benefit as is set out in the subsection. Such defence, in order to succeed, must show not only that the dismissal was for a cause other than the mere fact that the worker acted in any of the specified capacities, but also that it

was for a cause other than what the worker said or did while so acting.

Quaere, Whether the Court should regard proceedings to recover a penalty under s. 2 as criminal proceedings, and give judgment for a defendant if he establishes a possibility that the worker was dismissed for a reason other than that the worker had acted in any of the specified capacities.

R. v. Carr-Braint ([1943] 2 All E.R. 156) referred to.

CLAIM for a penalty under s. 2 of the Industrial Conciliation and Arbitration Amendment Act, 1943, based on the alleged wrongful dismissal by the defendants of an employee named Sandham. This enactment was passed to prevent an employer dismissing a worker merely because the worker had taken part in the activities of the industrial union to which he belonged, and might be described as an anti-victimization enactment.

The evidence in the present case shows that Sandham was employed in the benching department of the defendant's boot and shoe factory. He was also the Union delegate in the factory. Shortly before Christmas last year, the defendants sent for Sandham to discuss with him the amount payable to the workers in the factory. The defendants had decided to close the factory over the Christmas and New Year holiday period and to re-open on January 9, 1947. The defendants were apparently uncertain about the method of computing the holiday pay under the Annual Holidays Act, 1945, and thought that Sandham would know the exact position. It appears that, at the meeting between Sandham and the defendants, Sandham expressed his approval of the basis on which it was proposed to compute the holiday pay, but it afterwards transpired that this basis was wrong, and would have resulted in all the workers receiving more than they were entitled to. The defendants formed the opinion that Sandham knew quite well that they were proposing to compute holiday pay on the wrong basis, and had deliberately deceived them by approving of the proposed method. Accordingly, they decided to dismiss him, but did not do so until after he had resumed work on the re-opening of the factory. The defendants incorrectly informed Sandham that he was being put off because of insufficiency of work.

C. H. M. Wills, for the defendant.

Cur. adv. vult.

LUXFORD, S.M. The provisions of s. 2 (1) of the Industrial Conciliation and Arbitration Amendment Act, 1943, prescribe a penalty of £25 where an employer dismisses any worker or alters any worker's position in the employment to his prejudice if at any time within twelve months before his dismissal the worker had any of the following qualifications :

- " (a) Was an officer of any industrial union or branch of a union, or was a member of the committee of management of any union or branch, or was otherwise an official or a representative of any union or branch ; or
- " (b) Had acted as an assessor on a Council of Conciliation ; or

"(c) Had represented a union or branch of a union in any negotiations or conferences between employers and workers; or

"(d) Was entitled to some benefit of an award, order, or agreement, or had made or caused to be made a claim for any such benefit for himself or any other worker, or had supported any such claim, whether by giving evidence or otherwise; or

"(e) Had given evidence in any proceedings under the principal Act."

The effect of s. 2 (1) is to impose an absolute liability on any employer who dismisses a worker to whom the subsection applies, unless the employer establishes the following defence namely:—

"That the worker was dismissed or that his position was altered for a reason other than that the worker had acted in any of the said capacities or was or had been entitled to or had claimed any such benefit as aforesaid."

[The learned Magistrate then stated his findings of fact, and continued:] The first and substantial question is whether or not the defendants requested Sandham to advise them as to the amount of holiday pay due to the workers, in his capacity of a servant of the defendants or as the Union delegate. The defendant Payne stated in evidence that he asked Sandham to come to the office to advise him (Payne) in making up the pay slips in reference to holiday pay, and added:

"I knew he was the Union delegate; I assumed that he had knowledge of the position by reason of his being Union delegate. I just read out one or two slips to see if I was working on the right lines. I read his slip. He said it was correct."

In view of this statement, I must draw the inference that the defendants interviewed Sandham and sought his advice believing that he had, by virtue of his office, the necessary knowledge of Annual Holidays Act to determine whether or not their method of computation of holiday pay was correct. I must further draw the inference that the defendants sent for Sandham because he was the Union delegate who represented all the workers in the factory in respect of matters relating to the remuneration they were by law entitled to receive. The evidence of the defendant Payne shows that the defendants dismissed Sandham solely by reason of his conduct at the interview. Viewing the evidence as a whole, I am satisfied that the defendants honestly believed that Sandham knew full well that they were adopting a basis of payment which would mean that all the workers would receive more than they were entitled to, but I am not satisfied that Sandham wilfully intended to deceive the defendants.

The Inspector of Factories has, therefore, established that Sandham was a representative of a Union while employed by the defendants, and that he was dismissed by them because of what he did while acting as such representative.

The next question is whether the evidence has established any facts which constitute a defence in accordance with the proviso to subs. (1) of s. 2. The material parts of the subsection are as follows:

"Provided that it shall be a defence to the employer if he proves
"that the worker was dismissed . . . for a reason other than
"that the worker had acted in any of the said capacities . . ."

In the present case, the defendants must prove sufficient facts to establish that Sandham was dismissed for a reason other than that he had acted as Union delegate. It may well be that this Court should regard proceedings to recover a penalty under s. 2 as criminal proceedings, and give judgment for a defendant if he establishes a probability that the worker was dismissed for a reason other than the worker had acted in any of the specified capacities: see *R. v. Carr-Braint* ([1943] 2 All E.R. 156). It is not necessary for me to consider this question in the present case, because the evidence shows the precise reason for Sandham's dismissal.

The important words of the proviso to s. 2 are "other than that
"the worker had acted in any of the said capacities." There are two possible interpretations to these words—first, that the employer is not liable if he proves that the worker was dismissed for a reason other than the mere fact that he held one of the specified offices or appointments and carried out the duties thereof; secondly, that the employer is not liable if he proves that the worker was dismissed for a reason other than the manner in which the worker conducted himself while carrying out the duties of any of the specified offices or appointments.

In order to determine which of the two interpretations should be adopted, it is necessary to examine carefully the operative portions of subs. (1). In the year 1943, it would be impossible to suggest that any officer or representative of a Union would be in any danger of dismissal by his employer by reason only of his acceptance of office in an industrial union, but he might be by reason of what he does and says in the carrying out of his duties of his office. It would also be impossible to suggest that a worker would be in any danger of dismissal by his employer by reason only of the fact that he acted as an assessor on a Council of Conciliation, but he might be by reason of what he says in the course of the proceedings. It would also be impossible to suggest that a worker would be in any danger of dismissal by reason only of the fact that he had represented his union in negotiations or conferences between employers and workers, but he might be by reason of what he says at the meetings. It would also be impossible to suggest that any worker would be in any danger of dismissal by reason only of the fact that he gave evidence in proceedings under the Industrial Conciliation and Arbitration Act, but he might be by reason of what he says in evidence.

It is clear, therefore, that the Legislature intended to provide the classes of workers specified in s. 2 with something more than a shield of tissue paper, and the second interpretation should be adopted. That is to say, the defence referred to in the proviso to the section, in order to succeed, must show, not only that the dismissal was for a cause other than the mere fact that the worker acted in any of the specified capacities, but also that it was for a cause other than what the worker said or did while so acting.

The precise cause of Sandham's dismissal was what he did while acting as the Union delegate, and so comes within the penal provisions of the section.

In assessing the question of penalty, I must take into account the fact that the defendants honestly believed that Sandham had fraudulently attempted to obtain money for himself and the other workers in the factory to which they were not lawfully entitled. On the other hand, they never informed Sandham of their belief or gave him an opportunity to answer the charge of fraud. They just told him, untruthfully, that his services had to be dispensed with owing to insufficiency of work; further, that they had nothing against him personally. Having regard to all these circumstances, the penalty must be substantial, and is fixed at £10.

Judgment for plaintiff.

Solicitor for the defendants: *C. H. M. Wills* (Auckland).

KAPO MOKE PAKITAURA v. FLETCHER.

1947. May 8, 27, before Mr. W. H. WOODWARD, S.M., at Waitara.

Impounding—Trespass Rates—Jurisdiction—Whether recoverable by Action or by Way of Complaint—“Liable to pay”—“Sums of money . . . imposed on any person”—Impounding Act, 1908, s. 26 (2)—Magistrates' Courts Act, 1928, s. 27—Justices of the Peace Act, 1927, s. 389.

Trespass rates which an owner is liable to pay in pursuance of s. 26 (2) of the Impounding Act, 1908, are not recoverable by action under the Magistrates' Courts Act, 1928, but in the manner provided by s. 389 of the Justices of the Peace Act, 1927.

CLAIM under the Magistrates' Courts Act, 1928, for trespass rates under the Second Schedule to the Impounding Act, 1908, for the trespass by defendant's pigs on plaintiff's land. The term "cattle" in the Act includes pigs, and trespass rates are payable for trespass by pigs under s. 6 or s. 14, according as the land trespassed on is fenced or unfenced. No evidence of damage by the pigs was tendered.

C. White, for the plaintiff.

Middleton, for the defendant.

Cur. adv. vult.

WOODWARD, S.M. At the close of plaintiff's case, defendant's counsel moved for a non-suit or for judgment on the ground that trespass rates under either section are recoverable, not by civil action under the Magistrates' Courts Act, but under s. 389 of the Justices of the Peace Act, 1927. That section reads, as far as is material:

"(1) All fines, penalties, forfeitures, or sums of money which "under or by virtue of any Act now or hereafter in force are author-

"ized or directed to be imposed on any person shall and may, where
"no other form or mode of procedure is prescribed by such Act for
"the recovery of the same, be recovered in a summary way before
"any one or more Justices in the manner provided by this Act."

Section 6 of the Impounding Act, 1908, is headed, "Occupier of fenced land may sue for trespass rates or actual damage," which suggests a similar procedure in each case. The section itself, however, reads:

"The occupier of any fenced land trespassed upon by cattle
"may claim on account of such trespass the trespass rates provided
"in the Second Schedule hereto, or he may claim in any Court of
"competent jurisdiction full satisfaction for any actual damage
"sustained by him in consequence of such trespass; but if he claims
"such actual damage, then, although the cattle have been impounded
"or dealt with as provided in sections eleven and twelve hereof,
"they shall not be detained in the pound until payment is made
"of such actual damages."

Counsel for defendant submits that the section itself indicates that the procedure for recovery of trespass rates is different from that for recovery of actual damage. He refers to s. 13 and to ss. 9 and 10 as showing what that different procedure is.

Section 13 provides that the occupier of land trespassed on by cattle may restore the cattle to the owner and:

"recover in a summary way before any two Justices, from the
"owner of the cattle, the amount of any trespass rates that would be
"payable if the cattle were impounded in respect of the trespass
"thereof."

Sections 9 and 10 provide for complaint to a Justice by the owner of impounded cattle that the trespass rates or damages demanded are excessive, and that such complaint shall be "heard and determined in a summary manner before any two or more Justices," who may find, *inter alia*, that the trespass rates or damages demanded are excessive. Incidentally, it is curious that these sections include the amount of damages as well as that of the trespass rates as a matter to be determined in a summary way by Justices.

Section 8 provides that, in the case of an entire animal:

"there shall be payable as a special trespass rate, in addition
"to any other sum fixed under this Act by way of trespass rate, any
"sum not exceeding ten pounds, to be recovered in a summary way."

Counsel for the defendant submits that trespass rates are, in terms of s. 389 of the Justices of the Peace Act, "sums of money . . . imposed," and that the procedure by which they are to be recovered or the amount thereof determined as indicated in the sections I have quoted in the circumstances to which these sections apply, which is also the procedure under s. 389, is the only procedure by which they can be recovered when imposed under s. 6 or s. 14.

Counsel for plaintiff, on the other hand, refers to the omission in ss. 6 and 14 of any reference to a summary manner of recovery and to the use of the word "claim" in the one section and "recover" in the other. He submits that trespass rates, being payable by party to party, are not *ejusdem generis* with the fines, penalties, and forfeitures referred to in s. 389.

I think that not so much importance as counsel claims can be attached to the use of the words "claim" and "recover" in a statute which is not remarkable for the accuracy of its drafting, and that trespass rates, being independent of actual damage suffered, are in the nature of a penalty. Further, I doubt whether the jurisdiction of the Magistrates' Courts Act, as defined in s. 27 of that Act, is appropriate to the recovery of moneys which, though levied as the result of the tort of trespass, and payable by the owner of the trespassing animals to the owner of the land trespassed on, are not, in the ordinary sense, damages for the tort.

I am content to follow the decision of *Luxford*, S.M., in *Cartman v. Bradley Bros.* ((1928) 24 M.C.R. 46), with the result that plaintiff, having shown no cause of action, is non-suited.

Non-suited. Costs £1 11s. 6d. to the defendant.

Plaintiff non-suited.

Solicitors for the plaintiff: *Nicholson, Kirkby, and Sheat* (New Plymouth).

Solicitors for the defendant: *Monaghan and Middleton* (New Plymouth).

In re BOYD'S ESTATE AND MT. ROSKILL ROAD BOARD.

1947. June 23, July 1, before Mr. J. H. LUXFORD, S.M., at Auckland.

Rates and Rating—Urban Farm Land—Farm-land List—Objection to Removal of Area from Farm-land list—Subdivisional Plan of Land in Sections for Building-purposes presented to and approved by Road Board—Character of Land thereby changed—Objection overruled—Urban Farm Land Rating Act, 1932, ss. 2, 6, 13.

When the owner of a piece of suburban farm land causes a subdivisional plan of it to be made, showing separate lots of a size

suitable for the erection thereon of dwellinghouses, the Council of a Borough or the Board of a Road District is entitled to infer that the land is suitable for building purposes.

On an objection to the Council's or Board's decision, a Magistrate is entitled to draw the same inference and overrule the objection, unless the owner is able to prove facts sufficient to rebut the inference.

It is not a valid objection that the whole of the land must be fit for subdivision for building purposes before it ceases to be eligible for inclusion in the urban farm-land roll, as, on the approval of the subdivisional plan, the character of the land comprised therein has changed, and the land is no longer eligible for inclusion in the roll.

OBJECTION by the owner and occupier of an area of land in the Mt. Roskill Road District containing 49 acres 1 rood 0.7 perches. This land was placed on the Urban Farm-land Roll of the district at a special valuation of £1,358.

The unimproved value of the land was shown as £2,715. The land had a long frontage to Hillsborough Road. The owners recently had the land surveyed, and a plan was prepared showing forty-nine small lots with a frontage to Hillsborough Road, and six large lots ranging from 2 acres 3 roods 0.3 perches to 14 acres 2 roods 27.4 perches. These six lots lay behind the small lots, and each had a narrow frontage to Hillsborough Road.

The subdivisional plan was lodged for approval with the Mt. Roskill Road Board. The Board thereupon decided that the land had ceased to be urban farm land, and increased its value to the ordinary rateable value. This was done under the powers conferred on the Board by s. 26 (1) of the Urban Farm Land Rating Act, 1932. Notice was duly given to the objector under subs. (2), and an objection was duly lodged under that subsection against the decision of the Board.

Boyes, for the objector.

Milliken, for the Mt. Roskill Road Board.

Cur. adv. vult.

LUXFORD, S.M. "Urban farm land" within the meaning given to that term by s. 2 of the Urban Farm Land Rating Act, 1932, means land which (*inter alia*) for the time being—

"is not, in the opinion of the Council, Assessment Court, or Magistrate dealing with any application or objection under this Act, fit for subdivision for building purposes, or is not likely, in such opinion, to be required for building purposes within a period of five years from the date on which such opinion is expressed."

Mr. *Boyes* concedes that the owner's intention is to offer the forty-nine small sections for sale as building sections as soon as the subdivisional plan has been duly approved, but contends that the six large sections comprising approximately 38 acres are not fit for building purposes but will be used solely for farming purposes.

When the owner of a piece of suburban farm land causes a subdivisional plan of it to be made showing separate lots of a size suitable

for the erection thereon of dwellinghouses, the Council of a Borough or the Board of a Road District is entitled to infer that the land is suitable for building purposes. On an objection to the Council's or Board's decision, a Magistrate is entitled to draw the same inference and overrule the objection, unless the owner is able to prove facts sufficient to rebut the inference. Thus, the owner may show that he caused the subdivisional plan to be made for personal or family reasons, and has no intention of attempting to sell any lots, because he knows that there is not likely to be any chance of effecting a sale for years to come.

In the present case, the owner has not attempted to rebut the inference, but contends that the whole of the land must be fit for subdivision for building purposes before it ceases to be eligible for inclusion in the urban farm-land roll.

I am unable to agree with that contention. The Act has regard only for individual pieces of land—that is to say, separate rating units. The individual piece of land must maintain its character in its entirety in order to remain on the roll. It may well be that, by reason of the present subdivision, some of the six large lots, even if sold, will become eligible for inclusion in the next farm-land list prepared by the Board, or, if they are not sold, may still be eligible for inclusion provided that they become a separate rating unit and fulfil the requirements of the definition.

At the present time, however, the character of the piece of land containing 49 acres 1 rood 0.7 perches has changed, and the land is no longer eligible for inclusion in the roll.

For these reasons, the objection must be overruled.

Objection overruled.

Solicitors for the objector : *Reyburn, McArthur, and Boyes* (Auckland).

Solicitors for the Mt. Roskill Road Board : *Baxter, Shrewsbury, and Milliken* (Auckland).

[IN THE SUPREME COURT.]

NEW ZEALAND REFRIGERATING COMPANY,
LIMITED v. BLANCHARD.SUPREME COURT. Christchurch. 1947. September 11, 15. FLEMING,
J.

Annual Holidays—Holiday Pay—Shift-workers—Firemen working Engines on a Roster covering Four-weekly Period—Work on Shifts on Every Day of Week—Each Shift of Eight Hours only—Computation of "Normal weekly number of hours"—Average of Hours worked during Four-weekly Period—"Ordinary pay"—All Shifts worked at Award Rates prescribed for Respective Days—No Overtime worked—Annual Holidays Act, 1944, ss. 2 (1), 3 (1).

Where workers under an award were employed on shift-work extending over seven days of the week, and the roster covering four-weekly periods of work was the regular and normal system of work which had been in force for many years, an average of hours worked during that four-weekly period can be taken as the basis of arriving at "the worker's normal weekly number of hours" for the purpose of ascertaining his ordinary pay for the purposes of s. 3 (1) of the Annual Holidays Act, 1944.

Moon v. Kent's Bakeries, Ltd.(1), applied.

Under the terms of the relevant award, all shifts worked under the roster system consisted of eight hours only, to be worked at the ordinary time rates of pay for night work and for work on weekdays, Saturdays, and Sundays, respectively. Consequently, the rates of wages provided by the award are all ordinary rates for the particular periods of the week involved, and no question of overtime or perquisites arose.

(1) [1946] N.Z.L.R. 476.

APPEAL from the decision of the Magistrates' Court at Christchurch. The respondent, as plaintiff in the Court below, claimed from appellant the sum of £4 10s. 4d. as alleged short-payment of holiday pay under the Annual Holidays Act, 1944. The learned Magistrate found in favour of the respondent, and from this judgment the appellant appealed. 5

S. G. Stephenson, for the appellant. The worker's normal hours are eight hours a day, but there are three or four different rates of pay each week: New Zealand (except Westland) Freezing Workers' Award, 1946 (46 *Book of Awards*, 225), cls. 2 (e), 5 (9). If any worker works between 8 a.m. and 4 p.m. more than eight hours it is overtime, and work on Saturday and Sunday is overtime; as to "ordinary pay," see s. 3 (1) of the Annual Holidays Act, 1944, and the Factories Act, 1946, s. 19 (forty-hour week). 10

The ordinary rate of pay for five shifts at £1 4s. is £6. The term "ordinary time rate" has acquired a technical meaning in industrial law: it is the minimum or basic rate upon which overtime or extra rates are based and calculated. The ordinary time rate is calculated on the actual weekly earnings, made up of wages calculated at rates based on the ordinary rate, together with night-shift pay, which is an extra or perquisite: *Moon v. Kent's Bakeries, Ltd.*(1). It is immaterial whether it is paid regularly or not. 15 20

The intention of the Legislature was to limit the burden and benefit of the Annual Holidays Act, 1944, as it contemplates in certain cases a notional calculation of holiday pay: *Eyre v. Auckland Stevedoring Co., Ltd.*(2). 25

(1) [1946] N.Z.L.R. 476.

(2) (1945) N.Z.L.G.R. 339.

- In *Moon v. Kent's Bakeries, Ltd.*(3), the award was unique, and it is distinguishable from the present case. In factories, the limits of ordinary working-hours at the ordinary rate are prescribed by the Factories Act, 1946, s. 19 (3). Notice may be taken of the tendency of the Court of Arbitration to limit hours for which the ordinary pay is payable: cf. *In re New Zealand Freezing-works and Related Trades Industrial Association of Workers*(4), *In re Southland Wool, Grain, Hide, and Manure Stores Employees' Award*(5), and *In re Auckland Abattoir Assistants and United Freezing Workers' Union*(6).
- Where two meanings can be given to the language of a statute, the one which conforms to usual practice should be given. If there is any doubt, the former practice should be adopted.

- M. J. Gresson*, for the respondent. The Court is bound by *Moon v. Kent's Bakeries, Ltd.*(7), which decided the question now before the Court. In accordance with that judgment, the Annual Holidays Act, 1944, looks to an individual and not a class; the worker should not lose by his holidays(8); averaging may be applied where necessary(9); and ordinary wages include any payment made in pursuance of the integral and fundamental terms of the employment(10).
- Payment for a night-shift is included in ordinary wages: *Booth, MacDonald, and Co., Ltd. v. McGregor*(11).

- Stephenson*, in reply. The award considered in *Booth, Macdonald, and Co., Ltd. v. McGregor*(12) was in different language, and that judgment is distinguishable accordingly.

Cur. adv. vult.

FLEMING, J. Section 3 (1) of the Annual Holidays Act, 1944, is as follows:—

- Except as otherwise provided in this Act, every worker shall at the end of each year of his employment by any employer become entitled to an annual holiday of two weeks on ordinary pay.

Under s. 2 (1) of the said Act, the relevant part of "ordinary pay" is defined as follows:

- "Ordinary pay," in relation to any worker, means remuneration for the worker's normal weekly number of hours of work calculated at the ordinary time rate of pay . . .

The contract of employment between the parties is governed by the New Zealand (except Westland) Freezing-workers' Award (46 *Book of Awards*, 225). The respondent's work consisted of shift-work. The relevant portions of the said award are as follows:—

- 1 (5) (a) In the manure, tallow, oleo, fellmongery, preserving, and engine-room departments shifts may be worked to whatever extent may be deemed necessary to cope with the work; and a shift shall consist of eight consecutive hours, including twenty minutes' crib-time and two "smoke-ohs."

- (b) All work done by men on shifts shall be confined to the work of their respective departments.

(c) Any time worked in excess of eight hours on each of the five days of the week, Monday to Friday, both days inclusive, shall be paid for at time (or rate) and a half for the first four hours and double time (or rate) thereafter—

- | | |
|--------------------------------------|---|
| (3) [1946] N.Z.L.R. 476, 484, 1. 17, | (7) [1946] N.Z.L.R. 476. |
| 489, 1. 25, 492, 1. 9, 493, 1. 17, | (8) <i>Ibid.</i> , 484, 498. |
| 496, 1. 23, 497, 1. 11. | (9) <i>Ibid.</i> , 486, 501. |
| (4) (1923) 24 Bk. of Awards, 42. | (10) <i>Ibid.</i> , 484, 485, 1. 37, 486, 496, 500. |
| (5) (1924) 25 Bk. of Awards, 640. | (11) [1941] N.Z.L.R. 181. |
| (6) (1940) 40 Bk. of Awards, 2329. | (12) [1941] N.Z.L.R. 181. |

(d) Any work done on a Saturday shall be paid for at time (or rate) and a half for the first four hours and double time (or rate) thereafter.

(f) A worker employed on a night-shift between the hours of 4 p.m. and 8 a.m. shall be paid 3s. per shift in addition to the wage specified in the wages clause.

2. (13) *Engine-room*—Greasers, firemen, cleaners, gas-producers, and trimmers, at the rate of £1 4s. per shift of eight hours. 5

3. (7) All work performed on Sundays shall be paid for at double rates.

Respondent was employed as a fireman. It is necessary to keep the engines going continuously, and for that reason respondent and three other firemen work on a roster covering four-weekly periods. On three 10 weeks out of four, each of these men works five shifts of eight hours, and, on the third week, six shifts of eight hours. The work is necessarily performed at different periods of the day and night, and on all seven days of the week. The respondent's actual earnings for each four-weekly period amount to £32 12s. 10d., or a weekly average of £8 3s. 2d. This 15 respondent claims to be his "ordinary pay" within the meaning of the Act. The appellant, on the other hand, claims that, as respondent works five shifts of eight hours each in every three weeks out of four, his "normal" weekly number of hours is forty. Appellant also claims that the "ordinary time" rate of pay is that prescribed by s. 2 (13) 20 *supra*—namely, £1 4s. per shift of eight hours.

The learned Magistrate considered he was bound by the decision of the Court of Appeal in *Moon v. Kent's Bakeries, Ltd*(1). The judgments in this case are lengthy, but the headnote correctly sets out the findings of the Court. I cite the headnote as follows: 25

The Annual Holidays Act, 1944, is for the benefit of the individual worker, and not for a class; and each individual worker's claim to holiday pay must be decided in the light of the circumstances affecting that particular individual.

Booth, Macdonald, and Co., Ltd. v. McGregor ([1941] N.Z.L.R. 181) applied.

The statute contemplates that the worker is to have an annual holiday of two 30 weeks on ordinary pay, which means that his holiday pay is to be the pay which he has been ordinarily and normally receiving for his normal week's work, exclusive of overtime and of what may be defined as "extras" or "perquisites": subject to those exceptions, the worker is to have his holiday pay without loss to himself. 35

The meaning to be attached to the words "ordinary time rate of pay" if fully expressed, would read as follows: "The rate of pay for the worker's normal weekly 40 "number of hours of work calculated at the rates of pay habitually paid to him in "respect of such work exclusive of overtime and the rates paid to him in respect "of it." 40

Consequently, where a worker's normal weekly hours of work and his ordinary time rate of pay are fixed by the terms of his employment, the weekly sum so earned is within the words of the definition of "ordinary pay."

In my opinion, the learned Magistrate was correct in considering that he was bound by this decision, and that the present case is within the 45 terms of that decision.

Quite apart from the decision in *Moon's* case(2), I should have come to the same decision in this case as the learned Magistrate. The roster covering four-weekly periods of work is a regular and normal system of work, which has been in force for many years. It is, therefore, necessary 50 to take this four-weekly period in order to arrive at the normal weekly number of hours worked by respondent. An average of this normal four-weekly period can be taken: *Moon's* case(3).

A consideration of the award shows that ordinary time rates of pay are prescribed for different periods of the week. The basic rate is £1 4s. 55

(1) [1946] N.Z.L.R. 476.

(3) [1946] N.Z.L.R. 476.

(2) [1946] N.Z.L.R. 476.

- per shift. This is increased by 3s. per shift for night work ; work done on Saturday is at the rate of time and a half for the first four hours and double time thereafter. The rate for Sunday is double time. Time worked in excess of eight hours of any shift on the five days, Mondays to Friday, inclusive, is paid for at the rate of time and a half for the first four hours, and double time thereafter. This appears to be the only overtime rate of pay prescribed for shift workers. Section 1 (5) (a) provides that "shifts may be worked to whatever extent may be deemed necessary to cope with the work : and a shift shall consist of eight consecutive hours." Now, all the shifts worked under this roster system consist of eight hours only, so that in fact no overtime is worked by the respondent. In my opinion, the rates of wages provided for by the award are all ordinary rates for the particular periods of the week involved, and no question of overtime or of perquisites arises.
- 15 The appeal is, therefore, dismissed. I allow costs against the appellant. £10 10s., plus £4 4s. for second counsel.

Appeal dismissed.

Solicitors for the appellant : *Harper, Pascoe, Buchanan, and Upham* (Christchurch).

Solicitors for the respondent : *Wynn-Williams, Brown, and Gresson* (Christchurch).

AUCKLAND HARBOUR BOARD v. AUCKLAND CITY CORPORATION.

SUPREME COURT. Auckland. 1947. September 1, 5. CALLAN, J.

Harbour Board—Municipal Corporation—Reclamation by Harbour Board for Building Purposes of Land adjacent to Land under Jurisdiction of City Council—Subdivisional Plan thereof submitted by Board to Council—Council's Requisitions for Construction of Streets and Making of Reserves—Council's Powers in that behalf—Municipal Corporations Act, 1933, s. 332 (3)—Harbours Act, 1923, ss. 164, 165.

Where land adjacent to any land under the jurisdiction or control of a Borough Council has been reclaimed from the sea by a Harbour Board, and such land has been reclaimed for building purposes, and where the Harbour Board proposes to subdivide the same and has submitted to the Borough Council a plan of subdivision in accordance with the provisions of s. 332 (3) of the Municipal Corporations Act, 1933, s. 332 (3) empowers the Borough Council in all circumstances to require the Harbour Board, as owner of the said land, to make provision or further or other provision for the construction of streets, or the making of reserves, or to require that the work of making all new streets shown on the plan must first be completed to the satisfaction of the Borough Council.

Pollock v. Lands Improvement Co.(1), *Hornsey District Council v. Smith*(2), and *Uckfield Rural Council v. Crowborough District Water Co.*(3) applied.

Heydon's Case(4) referred to.

(1) (1888) 37 Ch.D. 681.

(2) [1897] 1 Ch. 843.

(3) [1899] 2 Q.B. 664.

(4) (1584) 3 Co. Rep. 7a; 76 E.R. 637.

ORIGINATING SUMMONS taken out for the purpose of settling a difference which had arisen between the Auckland Harbour Board and the Auckland City Corporation as to what were the powers of the City in connection with the subdivision of land reclaimed by the Harbour Board from the Waitemata Harbour for building purposes.

The facts were set out in an affidavit by the secretary of the Board, and might be summarized thus.

The Board was reclaiming from the Waitemata Harbour for building purposes certain land, of which the ownership had been vested in the Board, but the land had not yet been brought within the boundaries of the City, but it adjoined those boundaries. The whole of the land intended to be reclaimed had not yet been reclaimed, but sufficient had been reclaimed to warrant the erection of buildings thereon, and the Board was anxious to relieve the shortage of building sites by letting so much of the land as was now available without awaiting completion of the reclamation work. It being desirable that the lay-out of the subdivision should be considered as a whole, and not piece-meal, the Board, in May, 1946, caused to be submitted to the Auckland City Council for its approval a plan of the subdivision of the whole of the land, including therein the land not yet reclaimed as well as land then available for building sites.

The City Council, purporting to act under s. 332 (3) of the Municipal Corporations Act, 1933, before approving the plan, purported to require the Board to make provision, other than that shown in the plan, for the construction of streets and the making of reserves. It was stated by counsel for the Board that no requirement for the making of reserves on reclaimed land had on any previous occasion been made by the City. The Board was also the owner of other lands reclaimed from the sea, which, at the time of such reclamation, were adjacent to land under the jurisdiction and control of the Auckland City. These other lands had subsequently been included within the boundaries of the Auckland City pursuant to s. 139 of the Municipal Corporations Act, 1933.

The question asked in the originating summons was as follows :—

Where land adjacent to any land under the jurisdiction or control of a local authority has been reclaimed from the sea by a Harbour Board and such land has been reclaimed for building purposes and where the Harbour Board proposes to subdivide the same and has submitted to the local authority a plan of subdivision in accordance with the provisions of subs. 2 of s. 332 of the Municipal Corporations Act, 1933, does subs. 3 of the said section empower the Council of such local authority in any circumstances (and if so in what circumstances) to require the Harbour Board as owner of the said land to make provision or further or other provision for the construction of streets, or the making of reserves, or require that the work of making all new streets shown on the plan shall first be completed to the satisfaction of the Council.

Barrowclough, for the plaintiff Board. The Harbour Board approached the City Council to get a comprehensive plan approved, but the City Council wants provision for reserves. This is the first demand of this kind it has made ; and no such demand has been made elsewhere. The question is wider, as it covers the construction of streets. The affidavits show that the land is vested in the Board, but it has not yet been brought within the City's boundaries. A consideration of s. 332 (2) of the Municipal Corporations Act, 1933, and of s. 164 of the Harbours Act, 1923, shows that (a) the obligations of Harbour Boards on the subdivision of reclaimed lands are defined in s. 164 of the Harbours Act, 1923, and only there ; (b) s. 164 of the Harbours Act, 1923, and s. 332 of the Municipal Corporations Act, 1933, are inconsistent ; (c) s. 332 does not expressly repeal or abrogate s. 164 ; and (d) if both sections are to stand together, as they must, they can do so only on the principle *Generalia specialibus non derogant*, so that the general words in the Municipal Corporations Act do not apply to the special case of lands reclaimed from the sea before or after the reclaimed lands have been

brought within the borough boundary: *Garnett v. Bradley*(1). There is nothing here to show that Parliament, in enacting the Municipal Corporations Act, 1933, had its attention directed to the special harbour legislation. Had there never been a s. 164, there would still have been
5 an argument that s. 332 was not intended to apply to reclaimed lands; but, owing to s. 164, the plaintiff Board's position is stronger: *Garnett v. Bradley*(2), which shows that whether the maxim applies or not is entirely a question of extent, and that, where there is a special enactment dealing with a special case, there must be something in the later
10 legislation to show its intention of replacing the earlier one. The following factors are a guide: (a) section 332 (11) expressly repeals the Wellington special legislation: see, also, subs. 12, again showing the same intention, but it did not expressly repeal s. 164; (b) Harbour Boards are a special class of local bodies. They hold a sort of steward-
15 ship from the Crown, but their powers are more limited in the sense that they are frequently controlled by the Minister of Marine—e.g., Harbours Act, 1923, s. 137, which is *in pari materia* with s. 164, and it is not repealed because it has nothing to do with the making of a subdivision. The City Corporation could take lands for streets without
20 the Minister's consent; yet, once they are taken, they cannot be altered merely by agreement between the Board and the City Council, since the Minister would have to consent to the alteration.

Section 140 of the Harbours Act, 1923, shows that the land vested in the Board is held by the Board as trustee for the Crown, thus approach-
25 ing the position of the land being Crown land; but the Municipal Corporations Act, 1933, does not bind the Crown. It is unlikely that the Crown intended to surrender the Minister's power under ss. 164 and 165; but both these sections are inconsistent with s. 332; and see, also, ss. 141, 147, 211, 227, and the First Schedule to the Harbours Act, 1923. There
30 is no mention of reserves, and the City Council cannot be the judge of how much is payable for the construction; therefore, either s. 332 repeals ss. 164 and 165, or the maxim applies, and s. 332 applies to other objects, of which there are a number. Section 165 (3) is inconsistent with the idea of abrogation, and with the idea that s. 332 applies to
35 Harbour Board reclaimed land. The Harbour Board is the creature of statute, and has only the powers given it by its statute, which does not authorize it to give away its lands as a reserve. If that can be done, then authorization must be found in s. 332 of the Municipal Corporations Act, 1933. If there is a repeal by implication, there is a presumption
40 in the Board's favour that the earlier special legislation stands: *Broom's Legal Maxims*, 10th Ed. 348, 349. This argument is strengthened by consideration of the history of the legislation: s. 164 of 1923; s. 141 of 1908; s. 15 of 1878; and s. 332 of 1933 re-enacts s. 335 of 1920, before which it did not exist. After ss. 164 and 165 were abrogated in 1920,
45 without express repeal, they were re-enacted in 1923.

Alternatively, until the City boundaries include this reclaimed land, s. 332 does not apply; the words "under the jurisdiction" of a local authority in s. 164 of the Harbours Act, 1923, cannot mean "in," and this is inconsistent with "holding land in a borough" in s. 332 (2). A
50 Proclamation cannot be justified by s. 139 of the Municipal Corporations Act, 1933.

Stanton, for the defendant Corporation. As to the contention that there is an implied repeal: the two sections can remain in operation.

(1) (1878) 3 App. Cas. 944, 952, 953. (2) (1878) 3 App. Cas. 944.

Sections 164 and 165, which are closely linked together, represent the interim provision which is to apply between the date of reclamation and inclusion within the boundary. Unless land is included within the boundaries of the City, neither section has any application to such land. Both before and after the inclusion within the boundaries, the reclaimed land, if the Board wishes to subdivide it, is subject to the provisions of s. 332. The interim provisions originated in 1898, and there was then no such thing as statutory control of the subdivision of land. The purpose is to make the reclaimed land as approximate in position to Crown land as it is possible to do, with the intention of making this reclaimed land subject to the same powers by the local authority as the adjacent lands themselves; and that would apply to everything including these subdivisional powers. All these powers are territorial; and, without some such provision as s. 164, they could not be executed outside the City. If the powers given by s. 164 are exercised, the fee-simple would be vested in the City in the same way as streets within the City. This is a power given to the City, and upon it certain limitations are placed. The local authority is not under any obligation to take streets. Neither the Board nor the Minister can compel it to take any action in that direction. Neither s. 164 nor s. 165 has any application unless the Council is proceeding to exercise that power. Section 165 operates only where s. 164 does. But this provision has no application to such a position as the present, where the Board desires to give title and is bound itself to dedicate these streets before it can give leases. Section 125 of the Public Works Act, 1928, apart from s. 332, applies to a Harbour Board like any one else; cf. s. 127 of the Public Works Act, 1928, and the Land Subdivision in Counties Act, 1946. When the land comes within the City boundaries, then ss. 164 and 165 have no further application, as appears from the terms of s. 164. When it is in the borough, it is not merely adjacent to land in the borough.

Section 332 of the Municipal Corporations Act, 1933, speaks of land "in a borough," and any land, even Crown land and Harbour Board land, is not exempted from s. 332. The Harbour Board, by starting a scheme for subdivision, could not fail to observe all the obligations which otherwise belong to it as a subdividing owner. Section 164 deals with the case of a Council wanting to take streets; and s. 332 deals with an owner subdividing and dedicating streets which the Council perhaps might not want. This land, being once within the boundaries, is like all other land; so that the Harbour Board should be subject to s. 332. The inconveniences which would arise from Mr. *Barrowclough's* argument are so great that that could never have been the Legislature's intention. There is an understandable scheme: the land on reclamation is to be subject to the jurisdiction of the local authority, and certain powers are given to the authority as to streets and drains, subject to limitations intended to protect the interests of the Harbour Board: cf. s. 21 of the Harbours Amendment Act, 1933.

Section 165 was first enacted in 1910, but subss. 3, 4, and 5 were obviously added because of the new provisions as to subdividing which appeared for the first time in the Public Works Amendment Act, 1900. But, when a subdivision is brought within the Council's boundaries, it is subject to s. 332, or it is not subject to any control at all: *Christie v. Hastie, Bull, and Pickering, Ltd.* (3); that is not the case here. Section 30 of the Municipal Corporations Act, 1876, dealt with inclusion

in the borough of reclaimed land, and this is consistent with the submission that s. 164 is merely an interim jurisdiction. If s. 332 (2) applies, both before and after inclusion in the boundaries, there is no difficulty as to the point of time. Section 164 serves these purposes,
 5 as it places all reclaimed land under the jurisdiction of the adjoining borough and makes special provisions as to building land. It is difficult to see what limitation is there on the power of jurisdiction conferred. The borough can approve any exercise of its jurisdiction even although the land is never taken into the boundaries.

10 On the foregoing construction, there are no practical difficulties; but, if that construction be not accepted, it is difficult to say at what stage the change comes. The intention of the Legislature should not be defeated by crudity of expression: *McLauchlan v. Marlborough County Council*(4).

15 As to the application of the maxim, *Generalia non specialibus derogant*: two sets of legislation must exist to make the maxim applicable, both dealing in different terms with the same subject-matter, and then one or other has to give way, as in *Garnett v. Bradley*(5); but that is not the case here. Section 332 deals with an owner of land who himself
 20 wishes to subdivide. Sections 164 and 165 make no express reference to subdivision at all, and do not confer a right to subdivide, or an exemption from any statutory provision as to subdivision. Under s. 164, the Harbour Board might have to pay the whole costs of streets it did not want; but it cannot come to the City and say: "We want
 25 "these streets and you might have to pay for them; and, if you do not "agree with us about these things, we will take you to our Minister "and he may make you." This would be inconsistent with s. 125 of the Public Works Act.

Barrowclough, in reply.

30

Cur. adv. vult.

CALLAN, J. [After summarizing the facts, as above:] The legislative provisions principally in question are s. 164 of the Harbours Act, 1923, and s. 332 of the Municipal Corporations Act, 1933. Section 164 of the Harbours Act is in the following words:—

35 Where land adjacent to any land under the jurisdiction or control of a local authority has been reclaimed from the sea by the Board, the land so reclaimed shall be subject to the jurisdiction of such authority; and such authority shall, if the land has been reclaimed for building purposes, have power at all times and from
 40 time to time to take and lay out roads or streets and drains on and through any part of the land so reclaimed without making any compensation to the Board in respect thereof:

Provided, however, as follows:—

- 45 (a) The number, width, and position of the roads or streets, and the position of drains, shall only be determined with the consent of the Board, and in the event of the local authority and the Board disagreeing, then by the Minister.
- (b) Nothing herein shall be construed to authorize roads or streets of a less width than is prescribed by any Act.
- 50 (c) No drainage-works shall be allowed that will interfere with any works carried on by the Board and sanctioned by a Minister, without the consent of the Board or the Minister.

That section is followed by s. 165 of the Harbours Act, which provides for the cost of any road, street, or main sewer over or through reclaimed

(4) [1930] N.Z.L.R. 746.

(5) (1878) 3 App. Cas. 944.

land or other land vested in the Board or held as an endowment for it, the construction of which has been agreed upon between the Board and the local authority. By this section the Board is empowered to contribute such proportion of the cost of construction as it may have agreed upon, except that as to land not being reclaimed land, it is not allowed to bear more than 50 per cent. of the cost of construction. And subs. 2 of s. 165 provides that any dispute between the Board and the local authority as to the amount to be contributed by the Board in respect of the construction of any road, street, or main sewer as aforesaid shall be decided by the Minister of Marine, and that his decision shall be final and binding on both parties.

Section 332 of the Municipal Corporations Act, 1933, reproduces legislation which first made its appearance in 1920. It is not thought necessary to quote the whole section. Subsection 2 opens in the following words :—

Where any person holding any land in a borough proposes to subdivide the same, a plan of subdivision, showing the several allotments and their dimensions, and the streets and reserves (if any) proposed to be made, shall be prepared by a registered surveyor and approved by the Council before such subdivision is made.

Subsection 3 is in the following words :—

In any such case the Council may—

(a) Refuse to approve the plan if it is of opinion that the land is not suitable for subdivision ; or

(b) Require a new plan to be submitted ; or

(c) Before approving the plan, or any plan submitted in substitution therefor, require the owner to make provision or further or other provision for the construction of streets, or the making of reserves, or require that the work of making all new streets shown on the plan shall first be completed to the satisfaction of the Council.

Subsections 4, 5, and 6 give any person aggrieved by the decision of the Council the right to appeal to a Board consisting of a Magistrate and two other persons, whose decision is to be final.

Legislation comparable with s. 164 of the Harbours Act, 1923, has existed in New Zealand since 1878 : see s. 150 of the Harbours Act of that year, and s. 141 of the Harbours Act, 1908. This last-mentioned section was in force when the prototype of the present legislation dealing with subdivision was first enacted as s. 335 of the Municipal Corporations Act, 1920, but s. 141 of the Harbours Act, 1908, was not, upon that occasion, repealed or mentioned. Since then, s. 164 of the Harbours Act, 1923, and s. 332 of the Municipal Corporations Act, 1933, have been enacted, and on no occasion has Parliament, when making one enactment, repealed, amended, or even mentioned the other.

In these circumstances, the Court should, I think, hold, if that be possible, that it is the will of Parliament that both enactments should remain in force, and should fulfil some useful purpose. It is the duty of the Court to reconcile the two enactments if that can be done : *Pollock v. Lands Improvement Co.*(1), *Hornsey District Council v. Smith*(2), and *Uckfield Rural Council v. Crowborough District Water Co.*(3). The respective arguments submitted by counsel appear to recognize this. The difference between counsel is as to the manner in which this reconciliation is to be effected. For the Harbour Board, it is argued that this is a case for the application of the maxim *Generalia specialibus non derogant*. Counsel for the Harbour Board submits—

(1) (1888) 37 Ch.D. 661.

(2) [1897] 1 Ch. 843, 865.

(3) [1899] 2 Q.B. 664.

1. That as regards Harbour Boards their obligations as to subdivision of reclaimed land are defined by ss. 164 and 165 of the Harbours Act, and only by these sections.

2. That s. 164 of the Harbours Act and s. 332 of the Municipal Corporations Act are inconsistent.

3. That since s. 332 of the Municipal Corporations Act does not expressly repeal or abrogate s. 164 of the Harbours Act, the two must stand together, and that this they can do only on the principle that the general words in the Municipal Corporations Act do not apply to the special case of Harbour Board reclaimed land which is governed by s. 164.

According to the main submission made for the Harbour Board, this is the position not merely before but after the inclusion of such reclaimed land within the boundaries of the adjoining local authority. As an alternative submission, but only as an alternative submission, it is conceded for the Harbour Board that, when the reclaimed lands are included within the boundaries of the adjoining local authority, s. 332 begins to be applicable; but, so it is contended, even in this alternative submission, it has no application until the boundaries of the adjoining local authority have been altered so as to include the reclaimed lands. If this alternative submission be accepted, it would then appear to become necessary to determine how far the proposed subdivision must have got at the moment of alteration of boundaries for s. 332 to be applicable. To exclude the applicability of s. 332, will it suffice that a proposal to subdivide had been formulated before the boundaries were altered so as to include the reclaimed land? On another view, will s. 332 become applicable if, at the moment of such alteration of boundaries, anything remains unsettled—e.g., how the costs of streets are to be shared?

However, I have come to the conclusion that neither the main submission nor the alternative submission made for the Harbour Board should be accepted, but that, on the contrary, the method of reconciliation of the two enactments propounded on behalf of the City should be accepted. The fundamental difference between the two methods of approach is that counsel for the Harbour Board claims that s. 164 of the Harbours Act and s. 332 of the Municipal Corporations Act are inconsistent ways of dealing with the same question; whereas counsel for the City disputes this, and I have come to the conclusion that he is right. It is true that both sections deal with, *inter alia*, the laying-out of streets. It is also true that subdivisions often, possibly more often than not, involve the laying-out of streets; but that is not necessarily so. It may not be so where the proposed subdivision is of a block of land having a wide frontage to an existing street, but no great depth. Section 332 would apply to such a case; but s. 164 might not. Further, s. 164 might apply to a case which involved no subdivision, and to which s. 332 would, therefore, have no application. Suppose, for example, a Harbour Board reclaimed land from the sea, not for the purpose of subdividing it, but for the purpose of building upon it administrative or other buildings for its own use, then there might be no scope for the application of s. 332. But if the adjoining local authority desired to extend across the reclaimed land to the new waterfront the line of a previously existing street which had given access to the old waterfront, a situation would exist in which the provisions of ss. 164 and 165 could be useful. Provisions such as are contained in ss. 164 and 165 could, no doubt, be used so as to enable a local authority to exercise a measure of indirect control over the manner of subdivision adopted by an owner

who desired to subdivide. But that is not the only purpose to which the sections can be put. Therefore, a general legislative provision dealing explicitly with subdivision and only with subdivision seems not inconsistent with the continued existence of ss. 164 and 165 and their applicability to cases, to which the general provisions also apply. 5 Further, the general provisions in s. 332 deal not merely with the laying-out of streets. They also empower the local authority to require reserves; and they also give the local authority control over the size and shape of allotments. No powers as to these topics are conferred by ss. 164 and 165.

This is not, then, a case in which the Legislature has, in separate enactments, enacted conflicting solutions of the same problem. Here, the most that can be said is that the separate enactments overlap, in that s. 332 of the Municipal Corporations Act deals expressly and comprehensively with subdivisions, while s. 164 of the Harbours Act does not, 15 explicitly, deal with that topic at all, but is capable of being used so as to give a local authority a measure of control over subdivisions, but not so complete a control as is given by s. 332, and could also be used for purposes which have nothing to do with subdivision.

I now pass to a more particular examination of the language of the 20 enactments, and an attempt to interpret that language in the light of the principles laid down by *Lord Coke in Heydon's Case*(4).

When a Harbour Board has, for building purposes, reclaimed from the sea land which adjoins land under the jurisdiction or control of a local authority, s. 164 of the Harbours Act, 1923, confers on such local authority 25 an unusual power—namely, the power at all times and from time to time to take and lay out roads or streets and drains on and through any part of the reclaimed land *without making any compensation to the Harbour Board*. But, in my opinion, the section does more than that. It opens with the words:

Where land adjacent to any land under the jurisdiction or control of a local authority has been reclaimed from the sea by the Board, the land so reclaimed shall be subject to the jurisdiction of such authority.

This part of the section applies to all land reclaimed by a Harbour Board, whether for building purposes or not, and is then followed by the special 35 provision, already mentioned, which applies only to land reclaimed for building purposes. In my opinion, "the mischief and defect" for which Parliament was concerned in this first provision to provide a remedy was that new land which had been brought into being should be left, even for a time, uncontrollable in those various ways in which 40 experience shows control by a local authority to be desirable. Parliament may well have thought this mischief to be aggravated by the probability, amounting almost to a certainty, that land reclaimed by a Harbour Board would be in an urban area, and that the need for control by some local authority was therefore greater. In my opinion, "the 45 remedy the Parliament hath resolved and appointed" is to give to the adjoining local authority the same degree and kind of control over the adjoining reclaimed land as the law entrusts to it over land within its boundaries. It speaks of such land as being under the jurisdiction of such local authority, and then proceeds to enact that the reclaimed 50 land shall be subject to its jurisdiction. I find nothing in the language used which justifies the view that the local authority is to have less control over the adjacent reclaimed land not yet brought within its boundaries than it has over land within its boundaries. The absence

(4) (1584) 3 Co. Rep. 7a; 76 E.R. 637.

of any hint as to any respect in which the measure of control is to be different confirms that no difference is intended.

Turning now to s. 332 of the Municipal Corporations Act, 1933, which repeats provisions first enacted in 1920, I am of opinion that the mischief and defect for which on this occasion Parliament provided a remedy was the inconvenience and expense that were caused by reason of subdivisions being under no better control than then existed. The new legislation was, I think, prompted by a realization that towns ought to be planned rather than allowed to grow in a haphazard fashion, that prevention is better than cure, and that, if urban development were allowed to proceed in whatever manner was dictated by the natural desires of property-owners to sell their properties to their own best advantage, conditions might arise detrimental to the health and comfort of urban dwellers generally, which could be righted only by much expenditure of money, time, and labour, and the causing of inconvenience or even hardship. The remedy which Parliament "resolved and appointed" was to give to Borough Councils the very full control over proposed subdivisions conferred by the section, subject to appeal to a Board consisting of a Magistrate and two others. Inasmuch as, since 1920, a Borough Council has possessed this control over all proposed subdivisions of land in the borough, it follows, on my interpretation of s. 164 of the Harbours Act, that since 1920 a Borough Council has possessed similar powers over all subdivisions proposed to be made of Harbour Board reclaimed land adjoining its boundaries but not yet brought within those boundaries.

For the Harbour Board, it was stressed that s. 332 (2) speaks of "any person holding land in a borough," not of "any person holding land subject to the control of a Borough Council." That is true. But Parliament, in my opinion, had already enacted that all powers at any time possessed over land in the borough should be possessed also over adjacent reclaimed land. That had been done by s. 141 of the Harbours Act, 1908, interpreted as I interpret it. Therefore, when in 1920 a new power was conferred over land in the borough, that new power was, without further enactment, possessed also in respect of the adjacent reclaimed land. Then, in 1923, s. 164 of the Harbours Act of that year was enacted, at a time when Borough Councils already possessed these powers over subdivisions.

For these reasons, I am content to interpret s. 332 of the Municipal Corporations Act, 1933, as counsel for the City invites the Court to interpret it. And it is, I think, obvious that, unless this be done, there is danger that the intent of Parliament might be frustrated. Parliament has entrusted to the City Council the power, subject to appeal, to say what allotments it will approve in a subdivision, and what reserves it will take the opportunity afforded by subdivisions to create. According to the submissions made for the Harbour Board, the City is, in these matters, powerless to impose anything as to subdivisions on adjacent reclaimed land. In the result, those conditions might grow on urban land, destined in due course to become part of the City, which Parliament has, since 1920, shown an intention of preventing.

I think, then, that, despite the difficulties created by the terms in which the relevant legislation has been expressed, the intention of the Legislature is sufficiently clear, and that the question put by the summons should be answered in favour of the City. I venture the suggestion that it might, however, be an advantage if the will of Parliament as to topics with which this summons is concerned were mor-

clearly expressed, so as to prevent further questions arising. For example, s. 164 (c) of the Harbours Act, 1923, and s. 241 (2) of the Municipal Corporations Act, 1933, appear, *prima facie*, to enact conflicting provisions on the same topic—namely, who is to settle disputes as to drainage. And s. 165 of the Harbours Act, 1923, appears to be limited 5 in terms to cases where a Harbour Board and a local authority agree as to the construction of a road, street, or main sewer, and not to be applicable where they have differed but their difference has been settled by the Minister of Marine under s. 164 (a).

Throughout the question posed by the originating summons the 10 draftsman of the summons uses the expression "local authority," and not the expression "Borough Council," possibly because of the language of s. 164 of the Harbours Act. But, inasmuch as the question put is as to the powers conferred by s. 332 of the Municipal Corporations Act, "Borough Council" and not "local authority" appears to be the 15 appropriate phrase, and, in answering the question, I have altered it in that way. The Court's answer to the question is as follows :—

Where land adjacent to any land under the jurisdiction or control of a Borough Council has been reclaimed from the sea by a Harbour Board, and such land has been reclaimed for building purposes, and 20 where the Harbour Board proposes to subdivide the same and has submitted to the Borough Council a plan of subdivision in accordance with the provisions of subs. 2 of s. 332 of the Municipal Corporations Act, 1933, subs. 3 of the said section empowers the Borough Council in all 25 circumstances to require the Harbour Board as owner of the said land to make provision or further or other provision for the construction of streets, or the making of reserves, or require that the work of making all new streets shown on the plan shall first be completed to the satisfaction of the Borough Council.

Costs £36 15s. and disbursements for fees of Court and oath fees are 30 allowed to the City against the Board.

Question answered accordingly.

Solicitors for the plaintiff : *Russell, McVeagh, and Co.* (Auckland).
Solicitors for the defendant : *Earl, Kent, Stanton, Massey, and Palmer* (Auckland).

McARTHUR v. AUCKLAND HARBOUR BOARD AND ANOTHER.

SUPREME COURT. Auckland. 1947. July 14; August 20. CALLAN, J.

Master and Servant—Negligence—Transference of Employment—Loaned Servant under Control of Borrower as to Some Matters and under Control of Employer as to Others—Test to be applied as to which Control he was under.

Harbours—Harbour Board—Transfer of Board's Employees—Whether prohibited—Operation of Board's Cranes by Board's Crane-drivers—Liability to receive Directions from Hirers of Board's Cranes—Legal Consequences of such Liability—Harbours Act, 1923, ss. 190, 192.

War Emergency Legislation—Waterfront Industry Emergency Regulations—Water-siders deemed Employees of Ship-owners—Whether Crane-driver included—Effect of Regulations to pass to Ship-owners Responsibility for Injury—Waterfront Industry Emergency Regulations, 1946 (Serial No. 1946/102), Regs. 17, 18

A loaned servant may be, as to some matters, under the control of the borrower, though, as to others, he is to exercise the discretion entrusted to him by his permanent employers, a discretion vested in him because of his employer's confidence in his training, skill, and judgment.

The test is: Who was the person who had the right or power at the moment to control the way in which the act involving negligence was done?

Donovan v. Laing, Wharton, and Down Construction Syndicate, Ltd.(1), as explained in *Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool), Ltd.*(2), and *Horne v. The King*(3) followed.

The requirements of ss. 190 and 192 of the Harbours Act, 1923, are met if the Harbour Board cranes are operated by crane-drivers of whom the Harbour Board is the permanent employer. Those sections do not prohibit such crane-drivers from being liable to receive directions from the hirers of the Board's cranes in such matters as are usual and proper; and they do not prevent the normal legal consequences of such liability to control.

There may be evidence upon which it is open to the jury to conclude that in truth and in actual fact the services of the crane and its driver have been hired by the ship-owners; but, if, although there is no evidence to support the conclusion that the crane and driver were hired by the Waterfront Control Commission, the jury could so conclude, then Reg. 17 of the Waterfront Industry Emergency Regulations, 1946, would operate to pass responsibility to the ship-owners.

(1) [1893] 1 Q.B. 629.

(3) [1947] N.Z.L.R. 538.

(2) [1947] A.C. 1; [1946] 1 All E.R. 345.

ACTION claiming damages for injury against both the Auckland Harbour Board and the Union Steam Ship Company of New Zealand, Ltd.

On the evening of August 1, 1946, the ship *Samnethey* was being loaded with cargo at the Auckland wharf. The second defendants, the
5 Union Steam Ship Co. of New Zealand, Ltd., were the agents for the ship. The ship's gear and an Auckland Harbour Board crane were being used for the purpose of loading cargo into the same hold. The plaintiff was acting as hatchman in connection with the operation of the ship's gear, and, for the purpose of performing this duty, he was standing on
10 the ship's deck. He had nothing to do with the operations in which the Harbour Board crane was concerned. The crane was being driven by a trained crane-driver, who was a permanent employee of the Harbour Board. A load of wallboard, slung in a sling, was brought up off the wharf by means of the crane, and, while the wallboard was in the air, it
15 slipped from the sling and struck and injured the plaintiff. He sued both

the Harbour Board and the Union Company, alleging against each causative negligence by persons for whose negligence he alleged it was responsible. He claimed that the fall of the wallboard was caused by the negligent manner in which the sling was put round the wallboard by the watersiders, or by negligence of the crane-driver, or by a combination of the negligence of both. Assuming the crane-driver to have been negligent, which was denied, the Union Company claimed that the superior who should answer for his negligence was the Harbour Board, while the Harbour Board claimed that this superior was the Union Company. The quantum of damages, if there were to be damages, was agreed upon. 5 10

The following issues were put to the jury :

(1) Was the effective cause of the accident negligence by the crane-driver?

(2) Was the effective cause of the accident negligence by the watersiders?

(3) Was the effective cause of the accident negligence by the crane-driver and negligence by the watersiders? 15

(4) If you find the crane-driver to have been negligent, was the right to control him in the manner of doing that which he did negligently possessed by

(a) the Harbour Board? or

(b) the Union Steam Ship Company? 20

These issues were not acceptable to counsel for the Union Company. The jury answered "No" to the first question; "No" to the second; "Yes" to the third; and, in answer to the fourth, named the Union Steam Ship Co. as the party having the right to control the crane-driver in the manner of doing that which he did negligently. They added this rider : 25

The jury recommend that the system of two single snotters forming a bridle should be used at all times on cargo such as crates of pinex or similar nature. 30

The plaintiff moved for judgment against both the Harbour Board and the Union Company. The Harbour Board moved that it be adjudged that the plaintiff recover nothing from the Harbour Board, and that there be judgment against the plaintiff for costs in favour of the Harbour Board. The Union Company moved that judgment be entered against the Harbour Board, notwithstanding the answer the jury made to the fourth issue, upon the ground that there was not sufficient evidence upon which the jury could find the answer they found to that issue, or, alternatively, that the finding of the jury on the fourth issue be set aside and a new trial ordered on the ground that this finding was against the weight of evidence. 35 40

Leary, for the plaintiff

Barrowclough, for the first defendant.

West, for the second defendant.

West, for the second defendant, the Union Steam Ship Co., in support. [After reading the issues submitted to the jury and their answers thereto:] The negligence of both parties by effective cause must be accepted. The position of the evidence was not materially different at the end of the hearing from what it had been at the close of the Harbour Board's case. The question whether a certain person is vicariously liable is one of mixed fact and law; but, when the facts are ascertained or admitted, the question whether the facts establish the relationship 45 50

of master and servant or satisfy the onus of proof is a question of law. The particular enquiry now is what is His Honour's decision on the oral motion made by counsel and on the written motion: the notes to R. 286 of the Code of Civil Procedure, *Stout and Sim's Supreme Court Practice*, 235, go further than counsel has to go, because here there was no decision, but the motion for nonsuit was reserved: see *Reed, J.*, in *Jane v. Stanford*(1). The relevant facts are not really in dispute. There was an unavoidable confusion between the evidence concerning the extent or scope of the duty of the crane-driver and the negligence of the watersiders. Much of the evidence as to that aspect is not relevant to Issue No. 4. In *Horne v. The King*(2) the distinction is drawn between fact and law in these cases, and the principles and tests to be applied may be gathered from *Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool), Ltd.*(3), *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board*(4), and *Tollan v. Wellington Harbour Board and Port Line, Ltd.*(5)—namely: (a) There is a strong presumption against the transfer of a servant, and the burden of displacing it can be discharged only in exceptional circumstances. (b) In the case of a driver of a mechanical device belonging to a general employer, the presumption is stronger than in other cases; particularly is this so in the case of the complex mechanism of a crane. As a corollary, the directions given by others to the driver of a crane are to be regarded as given and received, not as the servant of the particular persons giving the directions, but as the servant of his own employer. (c) If there is merely a transfer of the use and benefit of the machine and of the services of the crane-driver, then there is no transfer of responsibility.

As against a third party who is injured, the enquiry whether there was an exception from the doctrine of vicarious liability where another person gave instructions is irrelevant: *Horne v. The King*(6), where the decision is on broader grounds. The question, therefore, is whether there is evidence of special circumstances in the present case which justify the finding that the relation of master and servant had ceased between the Harbour Board and the crane-driver, and had come into existence between the Union Company and the crane-driver. The following general factors point to a continued relationship with the Board; the engagement of the servant; the payment of wages; the instruction and training of driver; the allotting of the driver to the crane; the allocation of relief drivers for the same operation; the vesting of all disciplinary powers in the Board; the power of dismissal; and the fact that the crane is the Board's property and operates on the wharf.

The shipping company had to take the driver allotted by the Board, whether or not he was competent, and it might have had a change of drivers imposed on it at any moment. The Board had to go so far as saying that the driver had two masters during the passage of the load. It would have to admit that its servants gave him instructions as to how to work his machine in order to carry his load carefully, and that these instructions were in full force during the operation; but it suggests the shipping company gives him directions as to how to carry his load, so that he may carry it safely. This division is impossible. The particular negligence put to the jury by counsel for the Harbour Board and the issues were (a) failure to see that the load was insecure when first taken, (b) colliding with something *en route*, and (c) failing to prevent the accident

(1) [1935] N.Z.L.R. 891.

(4) [1942] A.C. 509; [1942] 1 All E.R.

(2) [1947] N.Z.L.R. 538, 553.

491.

(3) [1947] A.C. 1; [1946] 2 All E.R.

(5) *Ante*, p. 79.

(6) [1947] N.Z.L.R. 538, 553.

after the load began to wobble. Upon those, the jury found negligence against the driver. Each of these matters was peculiarly within the discretion delegated to the driver by the Board.

There are here two other aspects for consideration: (a) a confusion between physical control and the control exercised by the company over the watersiders: see the Waterfront Industry Emergency Regulations, 1946 (Serial No. 1946/102), Regs. 17 and 18. The Union Company is made liable for the acts of the watersiders: that fictional liability cannot extend to make the shipping company liable for acts of persons not employed by the Commission—*viz.*, a crane-driver who is not employed by the Commission. The Union Company is not in fact engaged in the loading or unloading of its ships; there is really an indemnity given to the Commission by the Union Company. Supposing here there had been merely a claim against the Harbour Board and not the Union Company: the Harbour Board would not have said the driver was the servant of the ship. The ship-owners, if indemnity had been sought from them, would have said: "We had nothing to do with it; it was done by certain stevedores and your crane." Any argument between the Harbour Board and the ship as to responsibility for accident *inter se* is not a matter relevant to the plaintiff's case. On the evidence as to control, the question is whether the Commission is in fact the controller, or whether under the regulations it can possess the responsibility for the ship.

The Waterfront Industry Emergency Regulations do not say that the ship shall stand generally in the place of the Commission and shall be liable for everything for which the Commission might be liable. The company's responsibility under the regulations is limited. If there was any instruction rightly given by a watersider which was the cause of the accident, the company would be liable: but it is not liable where the watersiders—*i.e.*, servants of the Commission—have made arrangements by which other people, not servants of the Commission, cause injury. The instructions here (signals, &c.) were not the cause of the accident; and, had they been, there would have been no negligence on the part of the crane-man.

(b) Sections 190 and 192 of the Harbours Act, 1923, show that the Harbour Board, which is a statutory body, has no authority to transfer its servants: all it may do is to transfer the service.

As to the alternative motion: there is no question of the credibility of the witnesses; the jury must have misunderstood the reference to "control" and must have thought it meant physical control; and the jury did not give sufficient attention to the onus of proof, or to the delegation of discretion to the crane-driver by the Board. Therefore, the answer to Issue No. 4 cannot stand and a new trial should be ordered.

Barrowclough, for the first-named defendant, the Auckland Harbour Board. If it is contended for the company that the crane-driver was working under the control of the Commission, it should be proved by evidence; but there was no such evidence. There is nothing in the Waterfront Regulations to say that the Commission takes over all waterfront operations. It is, therefore, not correct to assume that the Commission undertakes all waterfront work. The Union Company, and not the Commission, hired the crane, and a great part of the work of loading was done by the crane. It is a wrong assumption that the Commission was doing this work. There was evidence that the Union Company hired the crane. The crane-driver was transferred away from the Harbour Board, not to the Commission, but to the Union Company; and the

Union Company gave him instructions by its *agents*, the watersiders, who were the servants of the Commission but deemed to be the servants of the Union Company. The jury were entitled to find that the Union Company hired the crane, and exercised control of it through its agents, the watersiders. Either the crane-driver and the crane were in the employ of the Commission or they were employed by the Union Company. If they were under the Commission, then the Union Company is liable, by virtue of Reg. 17.

As to the contention that under ss. 190 and 192 of the Harbours Act, 1923, the Board cannot transfer its servants: If that were a relevant factor, it was for the jury, and was presumably taken into account, because it was mentioned at the trial. Under s. 192, the Harbour Board need not keep to its regular employees; it can get employees anywhere and hire them out regularly or they may be hired for the time being. The power of dismissal is a factor to be taken into consideration. The Union Company can stop the crane-driver from operating the crane, but without dismissing him. It is true that the crane-driver was transferred with certain overriding instructions; but that is superimposed on behalf of the general employer, and not even he has authority to authorize endangering human life. The lifting restrictions as to weight are in the Board's by-laws, which must be approved by the Minister of Marine; and that is part of the general law. These were the only restrictions by way of overriding instructions. The decision was against the crane-owner in *Tollan v. Wellington Harbour Board and Port Line, Ltd.*(7), but no issues were put; *Johnston, J.*, was compelled to sit as a jury; the Judges of the Court of Appeal were themselves sitting as a jury, and by a majority decided against the transfer; and they differed, not as to the law, but on the findings of fact. In the *Mersey Docks* case(8), the Court of Appeal sat as a jury, because there was no issue there, and so did the House of Lords. In *Dowd v. W. H. Boase and Co., Ltd.*(9) and *McFarlane v. Coggins and Griffiths (Liverpool), Ltd.*(10) there was no finding of fact. Here care must be taken to distinguish between questions of fact and law, and *Tollan's* case(11), so understood, supports propositions of law which support the Harbour Board here(12); and see *Nicholas v. F. J. Sparkes and Son*(13). If there is room for difference of opinion between three Judges, it follows that there is room for an honest difference between reasonable jurors as to the degree of control. Here there was the evidence of Vickerman that it became the driver's duty to comply with the Union Company's orders, as the plaintiff's own witnesses proved. There was no dispute that the Union Company had more power than to give a mere signal when to lift and lower—*i.e.*, power to call back the crane at any time—and that it was the crane-driver's duty to obey.

The driver had the duty to obey the company's orders, and in certain cases not to disobey these orders: *Nicholas v. F. J. Sparkes and Son*(14), approved in *Tollan v. Wellington Harbour Board and Port Line, Ltd.*(15), and impliedly approved by the House of Lords in *Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool), Ltd.*(16). But

(7) *Ante*, p. 79.

(8) [1947] A.C. 1; [1946] 2 All E.R. 345.

(9) [1945] K.B. 301; [1945] 1 All E.R. 605.

(10) [1945] K.B. 301; [1945] 2 All E.R. 345.

(11) *Ante*, p. 79.

(12) *Ibid.*, pp. 91, 1. 40, 99, 100, 101, 1. 41.

(13) [1945] K.B. 309*n*.

(14) [1945] K.B. 309*n*.

(15) *Ante*, pp. 79, 98, 103, 1. 44, 106, 109.

(16) [1947] A.C. 1; [1946] 2 All E.R. 345.

here the Union Company had the right to give orders at all stages of handling the cargo, and did in fact give the order in the execution of which the accident happened. If the operation is ordered by the Union Company, it matters not whether it is intrinsically dangerous or not; it suffices that the crane-driver is negligent in the course of the operation which the Union Company ordered him to undertake. This whole topic is akin to that of the independent contractor. If the servant is sent only to produce a result, he is under no orders as to how he shall do the work: he is simply to produce a result. But he might be under such a degree of control as to how he shall do it as to make him a servant of the man who hires his crane. It is a question of how much right of interference or control by the temporary employer is sufficient to shift the responsibility, and that is for the jury. In *Tollan's* case(17), there was no control in the particular operation in which the accident happened, so that there was more conflict of evidence than there was here. The test is: who has the right to control the servant in the manner in which he does that which he is said to have done negligently?

The controversy arises out of two things: (a) the word "control," and (b) what is the thing or act or operation which is found to have been "done negligently." It is a question of degree of control. The "*patron habituel*" always retains some control, and the "*patron momentané*" always has some control: *Bain v. Central Vermont Railway Co.*(18) and *Hunia v. Winstone, Ltd.*(19), a jury case, where, on the facts, the Texas Oil Co. had such a degree of control as to warrant a transfer; but again the degree of control was the essence of the matter, and that is for the jury. No case defines the necessary degree, with one possible exception—*M'Cartan v. Belfast Harbour Commissioners*(20), in which the issue was criticized, which seems to imply that, though the degree of control is merely when to lift or lower, that is not enough; but here there was more control and for different purposes.

The other difficulty is in defining the act found to be done "negligently"; it is the broader conveyance of things, the whole conveyance from the first lift to depositing; or, alternatively, the swing back with the load going back under orders. The phrase, "done negligently," connotes the doing of a series of acts or the producing of results which might involve a score or more of acts or movements or exercises of discretion. The crane-man might receive an order which involves lifting, slewing, and luffing, increasing and decreasing the speed, and all these movements done gradually so as to keep the load steady; so there is the exercise of some discretion. As to all these moves, the crane-man would ordinarily get no orders from any one; but, if he is complying with the hatchman's orders to get the load in the particular required position—*Nicholas v. F. J. Sparkes and Son*(21)—then the whole series of acts constitutes "that which he has done negligently."

Horne v. The King(22) was a very special case, but nowhere did the Court of Appeal say that the foreman had the right to say at one moment of time "Do this" and at another "Do that." The watersiders here had the right to say "Take the load back," but could not say, "One or more notches," &c. Here the Board was told to put the crane in a place which increased the difficulties. Left to itself, the Board would have kept well away from the light-standard; and that helps to make the Union Company responsible.

(17) *Ante*, p. 79.

(18) [1921] 2 A.C. 412.

(19) [1946] N.Z.L.R. 871n, 819n, 1. 30,

820n, 1. 33.

(20) [1911] 2 I.R. 143.

(21) [1945] K.B. 309n.

(22) [1947] N.Z.L.R. 538.

This was the position which arose in *Hunia v. Winstone, Ltd.*(23), where the driver had to unload, but he had to unload at a time and in a manner which the Texas Oil Co. wanted; and it was held that the degree of control was sufficient. *Dowd's* case and *McFarlane's* case(24) are distinguishable on the facts. In *M'Cartan's* case(25), the whole explanation is in the issue and the answer, as there was no authority to give any orders except when to lift and when to lower(26). Here, there is a much more extensive control than existed there or in *Horne's* case(27); and see *Hunia v. Winstone, Ltd.*(28).

- 10 On the evidence which must have been accepted by the jury, no greater measure of control would have been vested in the hirers. It was almost absolute, restricted only by the facts that (a) they could not dismiss him, but they could stop him working, and (b) the crane was not to be used so as to endanger life or property. The control was so nearly
15 absolute that the jury could say as they did. The Board's position is only better in that they could discharge the crane-driver. Control is a question of degree, and that is the province of the jury.

- West*, in reply. Had the question been "Was the crane-man the servant of the Board or of the Union Company?" that would have been a
20 much larger and broader question than that which the jury were asked to answer. In *Quarman v. Burnett*(29), the jury's finding was not accepted, but judgment was given notwithstanding their verdict; and there was no jury in *Nicholas v. F. J. Sparkes and Son*(30).

- In s. 205 (6) (7) of the Harbours Act, 1923, the legislation is for pilots,
25 but there is no statutory provision for crane-men. In *Tollan's* case(31), *Fair, J.*, said *Johnston, J.*, did not apply right principles. Here, there were no disputed facts. The only question for the Court is the legal result from these facts.

Cur. adv. vult.

- 30 *CALLAN, J.* At the trial, I inclined to the view that the proper answer to the fourth question was that the relevant control was in the Harbour Board, and not in the Union Company, and the summing-up was on this issue unfavourable to the Harbour Board, and favourable to the Union Company. The jury, however, took the other view, and my duty now
35 is to consider whether there was any evidence which, if believed by the jury, would justify their answer to the question. I have come to the conclusion that there was such evidence. It appears to be common ground that, if the watersiders observe that a sling is insecure, they can direct the Harbour Board crane-man to lower it to a position of safety,
40 and that, if the crane-man himself observes insecurity in a sling, he ought, without waiting for anybody to point it out to him, to take some appropriate action, such as giving a warning and lowering it into a position of safety. This seems common sense. A sling, whose contents are in danger of coming out, is an obvious menace to everyone below it. The practice
45 deposed to in the evidence appears to be a natural recognition of the fact that, if such a menace is observed by anyone, he has a duty, in protection of the safety of everyone, to do something effective about it, if he can. Anyone can shout a warning; but the crane-man has, in addition, the

(23) [1946] N.Z.L.R. 817n.

(24) [1945] K.B. 301; [1945] 2 All E.R. 605.

(25) [1911] 2 I.R. 143.

(26) *Ib. id.*, p. 150.

(27) [1947] N.Z.L.R. 538

(28) [1946] N.Z.L.R. 817n, 812n, 1. 32.

(29) (1840) 6 M. & W. 499; 151 E.R. 509.

(30) [1945] K.B. 309n.

(31) *Ante*, pp. 79, 100, I. 43, 101, 1. 37.

power, by manipulation of his crane, to attempt to get the menace from over the heads of those whom it might injure. A witness named Geake, who was a watersider working on the wharf, claimed to have noticed from the very first that this particular sling was unsafe; that, instead of the rope fitting closely round the wallboard, there was at one point a gap of 6in. to 9in. between the rope and the load. This witness may have been believed. The crane-driver himself said that he never at any stage saw anything wrong with the way the sling was fastened, and that the light and his position were such that he would have had difficulty in observing any fault in the sling. However, this seems to have been a matter for the jury, and, upon the evidence, it cannot, I think, be said that it was not open to them to form the conclusions (i) that the sling was visibly unsafe; (ii) that the crane-driver should, by the use of his eyes, and notwithstanding his duty to be watchful for signals from his hatchman, have become aware of this unsafe condition of the sling in sufficient time to have prevented the accident. He himself describes a wait of some two minutes during which the load was stationary in the air, while he waited for a signal from his hatchman to lower into the hold. The reason for this delay, no doubt, would be that they were waiting till the ship's gear, which was working into the same hold, got out of the way. It was, I think, open to the jury to find against the crane-driver that he was negligent in allowing to remain suspended in the air, in a position which constituted a danger to all who were below, a sling which he ought to have known was insecure.

I myself would have hesitated to come to that conclusion. But I am not prepared to say that this conclusion was not open to reasonable men who believed that the defect in the sling was as visible as Geake described it. Some time must have elapsed from the moment the crane-driver first began to lift the load until it fell. During the first part of its journey, it was below him, and in better light than when it was aloft. It must have passed from below to above the level of his eyes. There was evidence that it showed a tendency to turn in the air, owing to wind or other causes. This would mean that more than one side of it would become momentarily turned towards the crane-man. The jury could find that he should have discovered, in time to avert the fall, that this sling was insecure.

As to who has the right to control the crane-driver in a matter of this kind, the evidence is really all one way. The witnesses concur that, if the watersiders or the shipping company's servants observe or think that there is something insecure about a sling, they may direct the crane-man to lower it again, and he must obey, and he admits that, had he noticed insecurity, he would have taken appropriate steps. If a crane-driver negligently keeps in the air, in a position which causes danger, an insecure load of whose insecurity he has been told, or is aware, or ought to be aware, then it is a tenable view that he is being negligent in a matter as to which he is controllable by the servants or representatives of the ship-owner, and not in a matter as to which he is to exercise his discretion and his acquired skill as a crane-driver. For these reasons, in my opinion, the jury's answer to the fourth issue must stand.

I record that this is not the only basis upon which it was sought to support the jury's answer to this fourth issue. There was evidence, which the jury was entitled to accept, which gave the following account of the mishap. It was said that the crane-driver, having hoisted the load and having swung it inboard, was directed to take it out again because the hold, owing to the operation of the ship's gear, was not, at the moment, ready to receive it; that, in obeying this direction, he negligently allowed

the load to come in contact with some structure on the bridge, over which he had to swing; and that this contact disturbed the insecurely slung load and caused the fall. Although this version conflicted with other versions of the mishap, it was a version the jury were entitled to accept.

- 5 But, even so, I am not satisfied that they would therefore be entitled to place responsibility on the Union Company instead of on the Harbour Board. No doubt the Union Company would, in that event, have ordered the particular movement of the crane during which the negligence occurred. But a right to order a crane-driver to move a load in a certain
10 direction does not seem to import a right to control him in his manner of executing the movement. That seems rather to be a case for the exercise by him of his skill acquired by training, of the art he has learned, and of the discretion entrusted to him by the Harbour Board. Being at least doubtful whether a contrary view was open to the jury, I prefer to base this
15 judgment only on the other ground hereinbefore stated.

- All the cases which are now usually cited in discussion of responsibility for loaned servants were cited during the argument. No complaint is made as to that. But it is not necessary to discuss them in this judgment. If the only negligence alleged against the crane-driver had been negligent
20 mismanagement of his crane, whereby the load hit some obstruction and fell, then such a detailed discussion of the leading cases as was made in the argument would probably have been necessary in the judgment. But, in the view I take of the matter, that becomes unnecessary.

- It would, of course, be quite wrong to look upon this case as deciding
25 that, when a Harbour Board hires out a crane and a crane-driver to persons engaged in cargo work, the Harbour Board cannot be responsible for negligence of the crane-driver in the course of the work. That is not the law. Each case, as it arises, must be decided upon its own particular facts, and the same tribunal, approaching two cases in exactly the same
30 way, might properly decide them differently, because of differences in the relevant facts. Further, since reasonable persons may sometimes differ as to the conclusions to be drawn from ascertained facts, conflicting decisions on identical facts seem not impossible.

As to the decided cases, I content myself with this comment.

- 35 Counsel for the Union Company rightly stresses that the onus is on the permanent employer to establish the transfer of the servant. The jury were so directed. But he also contends, so I understood, that a servant is transferred wholly or not at all; that is to say, he disputes that there can be a situation in which the responsibility for what a loaned servant does is, as to some matters, upon his permanent employer, and, as to
40 other matters, upon the borrower. I do not accept this submission. There is, I think, sufficient authority for the contrary view. In *Salmond on Torts*, 10th Ed. 87, in a passage which reproduces the language of earlier editions by Sir John Salmond, the question is stated to be whether
45 the loaned servant:

becomes *quoad hoc* the servant of the person for whom he is working or remains in all respects the servant of his ordinary employer.

- In my respectful opinion, this way of stating the matter is in accord with authoritative cases reported up to the date of the Tenth Edition of *Salmond on Torts*. Since then the matter came before the House of Lords in
50 *Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool) Ltd.*(1). Viscount Simon(2) quotes and explains Lord Justice Bowen's test in *Donovan v. Laing, Wharton, and Down Construction Syndicate*,

(1) [1947] A.C. 1; [1946] 2 All E.R. (2) *Ibid.*, 11; 348.

Ltd. (3). That test calls for enquiry as to "who has a right at the moment to control the doing of the act" (4). *Viscount Simon* accepts this, but explains that to control the act means "to control the way in which the act involving negligence was done" (5). In the *Mersey Docks* case (6), *Lord Macmillan* is reported (7) as speaking of an employer showing, if he can, that he has for a particular purpose or on a particular occasion temporarily transferred a servant. And *Lord Porter* speaks of ascertaining who is the employer at any particular time (8). In *Horne v. The King* (9), *Kennedy, J.*, having quoted these three passages from the *Mersey Docks* judgments, poses this question: "Who then was the person who had the right at the moment to control the way in which the act involving negligence was done?" (10). And a little later that learned Judge uses this language: "whether the Public Works Department or J. H. McDonald and Co., Ltd., was the master of the driver at the critical time and had power to control, in the respect in which negligence was alleged, the manner of his driving" (11). In my view, a loaned servant may be, as to some matters, under the control of the borrower, though as to others he is to exercise the discretion entrusted to him by his permanent employer, a discretion vested in him because of that employer's confidence in his training, skill, prudence, and judgment.

It was also argued for the Union Company that the Harbour Board is a statutory body with only those powers which Parliament has conferred, and that the language of ss. 190 and 192 of the Harbours Act, 1923, shows that transfer of its servants is prohibited. It is true that s. 190 says that the Board by its employees may render services, and that s. 192 casts on the Board the duty of supplying all necessary labour for working cranes at all reasonable times. But, in my opinion, the requirements of these sections are met if Harbour Board cranes are operated by drivers of whom the Harbour Board is the permanent employer. These sections do not, I think, prohibit such drivers from being liable to receive directions from the hirers of cranes in such matters as are usual and proper; nor do they prevent the normal legal consequences of such liability to control.

An argument was also founded on Regs. 17 and 18 of the Waterfront Industry Emergency Regulations, 1946 (Serial No. 1946/102). It was argued that, though, under these regulations, the watersiders, who in actual fact are employed by the Commission, are deemed to be employed by the agents of the ship, that fiction does not extend to the crane-driver, and that the ship-owners are not liable where the watersiders have made arrangements whereby persons, not servants of the Commission, cause injury. I accept two answers to this made by counsel for the Harbour Board—namely, (i) that, upon the evidence, it was open to the jury to conclude that in truth and actual fact the services of the crane and its driver had in this case been hired by the Union Steam Ship Co.; (ii) that, if, although there was really no evidence to support the conclusion that the crane and driver were hired by the Commission, the jury could so conclude, then Reg. 17 would operate to pass responsibility to the Union Steam Ship Co. as the agents of the ship, and that nothing in Reg. 18 prevents this.

I conclude, then, that there is no good reason why the jury's answer to the fourth issue should not have effect.

(3) [1893] 1 Q.B. 629.

(4) *Ibid.*, 634.

(5) [1947] A.C. 1, 11; [1946] 2 All E.R. 345, 348.

(6) [1947] A.C. 1; [1946] 2 All E.R. 345.

(7) *Ibid.*, 13; 349.

(8) *Ibid.*, 17; 351.

(9) [1947] N.Z.L.R. 538.

(10) *Ibid.*, 558.

(11) *Ibid.*, 558.

Judgment for the plaintiff against the Union Steam Ship Co. of New Zealand, Ltd., for general damages £1,000 and for the following special damages; for lost wages £137 3s. 6d. and for teeth £26 5s. It is understood that the agreement between counsel covers also hospital and medical expenses, but the figures have not been supplied. In case any difficulty arises, these items are reserved for further consideration. The plaintiff is also to have judgment against the Union Company for costs as in the scale with disbursements and witnesses' expenses as fixed by the Registrar. Three extra days of the trial are certified for at £15 15s. each, and £2 2s. allowed on the motions, counsel for the plaintiff having been allowed, at his request, to retire at the commencement of the argument.

It was, I think, reasonable for the plaintiff to join both defendants. I do not remember any suggestion to the contrary to have been made. The Harbour Board, having succeeded, should have costs, but these should not fall on the plaintiff, and I see no reason, in this case, why the order for costs of the successful defendant should not be made directly against the unsuccessful defendant.

Judgment, then, for the Harbour Board against the Union Steam Ship Co. of New Zealand, Ltd., for costs as in the scale, disbursements and witnesses' expenses to be fixed by the Registrar. Certificates are given to the Harbour Board for three extra days of trial at £15 15s. each, and £12 12s. are allowed to it for the argument of the motions, which occupied a full day.

Judgment for the plaintiff against the second defendant.

Solicitors for the plaintiff: *Leary and Giesen* (Auckland).

Solicitors for the first defendant: *Russell, McVeagh, and Co.* (Auckland).

Solicitors for the second defendant: *Jackson, Russell, Tunks, and West* (Auckland).

[IN THE MAGISTRATES' COURT.]

MACDUFFS, LTD., AND OTHERS *v.* LOWER HUTT CITY CORPORATION.

1947. April 30, May 1, 20, before Mr. A. M. GOULDING, S.M., at Lower Hutt.

Rates and Rating—Annual Value—Assessment for Rating Purposes—Rent Restriction Legislation to be taken into Account—Percentage of Reduction—Each Property to be separately treated—Rating Act, 1925, ss. 2, 20.

In assessing properties for rating purposes, the valuer must take into consideration, in determining what the hypothetical tenant would be prepared to pay for a hypothetical tenancy, the provisions of the Fair Rents Act, 1936, and the Economic Stabilization Emergency Regulations, 1942.

Poplar Assessment Committee v. Roberts ([1922] 2 A.C. 93), *Dunedin City Corporation v. Young* ((1941) 4 N.Z.L.G.R. 72), and *The Queen v. South Staffordshire Waterworks Co.* ((1885) 16 Q.B.D. 359) applied.

Once objectors can show that, in arriving at the annual value, a city valuer has omitted to give weight to a matter to which he should give weight, their objection is good, as each property must be separately looked at in fixing a definite percentage by which valuations can be reduced by reason of the restrictive legislation.

Ladies Hosiery and Underwear, Ltd. v. West Middlesex Assessment Committee ([1932] 2 K.B. 679) followed.

Stirk and Sons, Ltd. v. Halifax Assessment Committee ([1922] 1 K.B. 264) referred to.

OBJECTIONS to the assessments on annual value under the Rating Act, 1925. The facts sufficiently appear in the judgment.

N. T. Gillespie, for the City Valuer.

R. E. Harding, for MacDuffs, Ltd., and A. and W. Smith, Ltd.

H. R. Biss, for Felt and Textiles, Ltd.

Cur. adv. vult.

GOULDING, S.M. Evidence was called both on behalf of the City Valuer and the objectors in each case. For convenience, I set out the assessments and the substance of such evidence :—

MacDuffs, Ltd.: This company is assessed at £1,217 rateable value. Its premises are in the main shopping area of the City of Lower Hutt and comprise a smaller and a larger shop. The rateable value on the smaller shop works out at 6s. 8d. per sq. ft. and on the larger 5s. per sq. ft., but, allowing the statutory reduction, equals 4s. 3d. per sq. ft. overall.

A. and W. Smith, Ltd.: In this case, the assessment is £2,213. Part of the property is let in two shops to tenants. It is close to MacDuffs, Ltd., and the assessment works out at 5s. per sq. ft. The rental of the portion let as shops works out at 4s. 2d. per sq. ft.

Felt and Textiles, Ltd.: Three separate properties belonging to the company are assessed as follows :—

(a) *Railway Avenue*: Factory £3,500. This works out at 1s. 3d. per sq. ft. on factory space (52,080 sq. ft.), plus 1s. 4d. per sq. ft. on office and administrative space (3,680 sq. ft.).

(b) *Bell Road Property*: Assessed at £6,400, or 1s. 2.6d. per sq. ft. (105,241 sq. ft.).

(c) *Gracefield Road Property*: Assessed at £787, or 9d. per sq. ft. (21,000 sq. ft.).

The above assessments are greatly in excess of the assessments on the same properties for last year. The City Valuer's explanation for this—and it is a reasonable one—is that last year he took up his duties for the first time about two months before it was necessary, in accordance with law, to have the City assessments made. He had not sufficient data as to the rentals of either residential or City properties to work upon, and there were approximately 8,000 assessments to make. The Valuer is quite frank in admitting that, in those circumstances, it was not possible to make accurate or uniform assessments such as he now claims to have made. His object in making assessments this year, both upon dwelling-houses, shops, and other business premises,

and upon factories, has been to try and obtain equality and uniformity with regard to premises where similarity can be found in particular areas or with regard to particular types of houses, shops, and factories. He seeks to uphold the present assessments by what is called the comparative method of assessment. He cited to the Court various premises either near to the particular ones in respect of which objection is now made, or, if not near to, yet he says comparable with, them by reason of similarity in size or the use to which they were put. I do not think any useful purpose will be served by my traversing in detail the instances and examples of such other premises placed before me. The City Valuer also supported his assessments by quoting cases of similar properties assessed on an equal or higher basis than those of the objectors, and in which no objections have been lodged.

In all three cases, the City Valuer admits that, in coming to his assessments, he has done so without regard to the Economic Stabilization Emergency Regulations or the effect they may have upon rental values.

For MacDuffs, Ltd., evidence was given by Mr. Leighton, an experienced valuer. He calculated the rental value upon a basis commonly in use amongst valuers attempting to arrive at what would be the fair and equitable rent of the premises if the rent were to be fixed under the Economic Stabilization Emergency Regulations, and then deducting 20 per cent. in terms of the Rating Act. By those means he says the rateable value of MacDuffs, Ltd., should be £676 12s. 6d. In adopting this method, Mr. Leighton acted upon definite instructions to do so. He admits that, apart from the effect of the Stabilization Regulations, even greater rentals than those quoted by the City Valuer could be obtained, because of the exaggerated demand which at present exists for shopping-space in the locality near MacDuffs. Mr. Leighton says it is quite common to-day for large sums to be paid for non-existent goodwill in order to get premises where the rent is stabilized in accordance with the regulations.

Evidence was also led for the objector to show that the rateable value fixed on its Hutt City property exceeds the rateable value per sq. ft. on both its Auckland and Dunedin properties. The rateable value in Auckland (Queen Street) is 4s. per ft. on 21,878 sq. ft., and 1s. 9d. per ft. on 18,579 sq. ft. in the shop in Princess Street, Dunedin.

In the case of A. and W. Smith, Ltd., evidence was given that the premises were valued for mortgage purposes in 1945 at £24,545, and this was said to be a conservative value.

The managing-director of that company gave evidence that the actual rents being received by the company for the premises which are sublet are to-day equal to 4s. 2½d. per sq. ft.

With regard to Felt and Textiles, Ltd. (which I shall hereafter, for the sake of brevity, call "Feltex"), evidence was placed before the Court by both parties. Mr. Leighton in this case was called to support the City Valuer, and gave evidence as to what he thought the rateable value would be, uninfluenced by the Stabilization Regulations. He bases his figures on comparative rentals ruling in the district. His figures for the three properties are:—

- (a) *Railway Avenue*: £4,414, rateable value.
- (b) *Bell Road*: £7,292, rateable value.
- (c) *Gracefield Road*: £1,614, rateable value.

Mr. Leighton, however, admits that the restrictive legislation has an important bearing upon the question of the amount of rent which can be obtained for both dwelling-houses and business properties.

For the company, evidence was called as to the cost, including purchase of land and existing buildings, the erection of new buildings, and the alteration of existing buildings on its various properties.

Evidence was also placed before the Court by Mr. Harcourt, another well-known and experienced valuer. His figures as to the rateable value are:—

- (a) *Railway Avenue*: £2,579.
- (b) *Bell Road*: £5,544.
- (c) *Gracefield Road*: £626.

Mr. Harcourt does not approach the matter on the "comparative basis." He says there are no factories of a size or nature comparable with those occupied by Feltex, and that rentals being paid for large storage areas by the Government and a carrying company could not form a true basis by way of comparison to the fixed rateable value of the Feltex properties as he understands that term under the Rating Act.

I now come to consider the question, so ably argued on both sides in these objections, as to the construction to be placed upon certain provisions in the Rating Act and the effect (if any) on fixing rateable values on the provisions of the Economic Stabilization Emergency Regulations, 1942.

In *Smith v. Lower Hutt City Council* (*Ante*, p. 116), in an oral judgment I said: "The question what rent might be expected to be paid by a willing tenant to a willing landlord is clearly affected by the fact that the Fair Rents Act, 1936, applies to all dwellings; and, in my opinion, it is impossible to disregard the provisions of that Act when it comes to assessing annual rental value under s. 2 of the Rating Act, 1925" (*ibid.*, 117).

On that occasion, the case of *Poplar Assessment Committee v. Roberts* ([1922] 2 A.C. 93) was not brought to my notice. Now, not only has it been brought to my notice, but it has been dissected and subjected to critical examination by all counsel. I am invited, on the one hand, to reverse my finding in the *Smith* case (*supra*), and, on the other hand, to follow it and apply it in the present objections.

As to the meaning of the term "rateable value" as defined in s. 2 of the Rating Act, 1925, one need go no further than *Dunedin City Corporation v. Young* ((1941) 4 N.Z.L.G.R. 72.) In delivering the judgment of the majority of the Court of Appeal in that case (*Sir Michael Myers, C.J., Blair and Callan, JJ., Northcroft, J.*, dissenting), *Sir Michael Myers, C.J.*, said: "The basis of rateable value of a property is not the rent that is being paid by the actual lessee or tenant to the owner of the property, but the rental which a hypothetical tenant would be prepared to pay on the basis of a tenancy from year to year" (*ibid.*, 77).

On the question of the meaning of the term "yearly tenant," the Court adopted the words of Lord Esher, M.R., in *The Queen v. South Staffordshire Waterworks Co.* ((1885) 16 Q.B.D. 359): "A tenant from year to year is not a tenant for one, two, three, or four years, but he is to be considered as a tenant capable of enjoying the property for an indefinite time, having a tenancy which it is expected will continue for more than a year, but which is liable to be put an end to by notice" (*ibid.*, 370); and of Lord Herschell, L.C., in *London County Council v. Erith Overseers* ([1893] A.C. 562): "'The annual rent which a tenant might reasonably be expected, taking one year with another, to pay for a hereditament' is the same thing as 'the rent at which the same might reasonably be expected to let from year to year'" (*ibid.*, 588).

The Court of Appeal then went on to discuss what was the underlying basis on which rateable value depends and Myers, C.J., said: "There can therefore be no presumption, if the statute is silent on the point, that, for the purpose of ascertaining the hypothetical rent, the rates are to be paid by the tenant. But, in our opinion, though there are no express words, the statute by inference is not silent on the point. While it is true that it is the hypothetical rent, and not a matter of profit, upon which the rateable value depends, the underlying basis is that the rateable value is the equivalent of the hypothetical net annual return to the owner of the property as an investment. On that basis, 'net annual rent,' 'fair annual rent,' and 'rateable value' are in meaning interchangeable, and are, indeed, in the statutes of various jurisdictions used indiscriminately. The result may be obtained in various ways, but the underlying scheme or idea is the same. It may be obtained by ascertaining the gross amount that the hypothetical tenant would pay subject to specified outgoings or deductions, or (what amounts to the same thing) by ascertaining the rental that the hypothetical tenant would pay upon the basis of his paying the rates and other outgoings, or, as under our present Act in New Zealand, by ascertaining the gross amount that the hypothetical tenant might be expected to pay, subject to the deduction of a certain arbitrary or empirical percentage in lieu of specified deductions (including rates) which at best could only be estimated" ((1941) 4 N.Z.L.G.R. 72, 78, 79).

Summarizing the Court's conclusions, the Court gave the following answers to the questions placed before it: "1. The valuer should not assess the rateable value of a property on the basis of the rent actually being paid to the owner by an existing tenant. That is not the correct method.

"2. It is the duty of the valuer to take as his basis the gross annual rental—that is to say, the gross annual amount which a hypothetical tenant would be prepared to pay for the right to occupy the property on the basis of his being a tenant from year to year—that is to say, a tenant capable of enjoying the property for an indefinite time having a tenancy which it is expected will continue more than a year but which is liable to be put an end to by notice. The assessment must be made on the assumption that, in respect of his occupation of the premises, the tenant will not have to pay to any one anything other than this rent—that he will not have to pay anything for rates or taxes

"value of these premises, it does not fix the rateable value, and that
"any voluntary payment for the occupation of the premises in excess
"of the standard rent which a tenant might be expected to make can
"be taken into consideration in arriving at what the gross and rateable
"value of the premises should be" (*ibid.*, 44).

I need not refer to the other judgments in the Court of Appeal, because *Scrutton* and *Atkinson*, L.J.J., both supported the Divisional Court in its view that the Rent (Restrictions) Act must be taken into consideration in assessing rateable value.

That this view has been followed by rating authorities in England is clear from a number of passages to be found in *Witton Booth on Valuations for Rating*, 3rd Ed. After quoting largely from the judgments in the *Poplar* case, the learned author, at p. 108 of his work, dealing with factors which influence rental values says:

"In such revaluations, of course, the judgments in the case of
"*Poplar Union v. Roberts*, have been followed, but it will be observed
"that the decisions in that case were not that statutory rental values
"as understood in assessments for rating would be unaffected by the
"operations of the Rent (Restrictions) Act, indeed, on the contrary,
"it is obvious that such values must be affected thereby. That
"this would be the natural outcome was clearly in the minds of the
"Judges, both in the Court of Appeal and in the House of Lords."

The learned author there quotes from the judgments of *Lord Sumner* and *Bankes*, L.J. (*supra*).

There are other quotations in *Witton Booth* which show quite clearly that, in arriving at the rateable value of property in England, the effect of the Rent (Restrictions) Act has been taken into consideration.

Now, the Rent (Restrictions) Act in England differs materially from the Fair Rents Act, 1936, and its amendments in New Zealand, and also from the Economic Stabilization Emergency Regulations, 1942. In England the Rent (Restrictions) Act did not apply to all dwellings. If there is any parallel in England to our Economic Stabilization Regulations, it has not been brought to my notice, and I can only conclude that there is no such parallel legislation.

The effect of our Fair Rents legislation and Economic Stabilization Regulations is more far-reaching than the Rent (Restrictions) Act in England. Practically all property, whether dwellinghouses or business premises, comes within the purview of our legislation. Moreover, the Economic Stabilization Emergency Regulations, 1942 (Serial Nos. 1942/335, 1944/36) (Reprint), make it an offence for any person to demand any sum that is irrecoverable by virtue of the regulations or to demand or accept any rent of a dwellinghouse that is recoverable by virtue of the Fair Rents Act. Under Reg. 48, persons who commit offences against the regulations are liable to both heavy fines and to imprisonment.

While it is true that properties the subject of tenancies either under the Fair Rents legislation or which come within the Stabilization Regulations may not be the subject of any application to assess the fair rents, while it is true that some landlords may receive rents in excess of the rents to which they are entitled by virtue of the Fair Rents Act or Stabilization Regulations, it appears to me that in such cases they

are committing offences against the regulations, since such excess rents are by law irrecoverable.

Can it be doubted that such matters have a very material bearing on what the hypothetical tenant would be prepared to pay for a hypothetical tenancy? I do not think so, and I see no reason to alter the view I expressed last year in *Smiths'* case to that effect. In assessing properties for rating purposes, in my opinion, a valuer must take these matters into consideration. I have no doubt that there will be differences of opinion amongst valuers as to the effect upon the hypothetical tenant of the legislation. That is inevitable.

Now, the Rent (Restrictions) Act in England has had a material effect upon rateable values there. The original Act was to have expired in 1923. It was still in force in 1937. The rents of properties subject to it had in a great many cases been increased in accordance with the statute. As *Witton Booth on Valuations for Rating*, 3rd Ed. 109, points out:

"It is obvious that, say, in a district where practically all actual rents permissible to be increased under the Rent Restrictions Act have been in fact so increased to the ultimate limit, for rating purposes the valuer in 'estimating the hypothetical rent at which the hereditament might reasonably be expected to let from year to year' must clearly take this fact into account in the same way as would the hypothetical parties to the tenancy."

The learned author also points out in the same page that actual rents are *prima facie* but not conclusive evidence of the hypothetical rents. Applying similar reasoning to New Zealand conditions, it appears to me that actual rentals as at September 1, 1942, provide *prima facie* evidence upon which to arrive at the hypothetical rental. In some cases, the hypothetical rental may agree with the actual rental; in others, it may not.

I repeat that it must not be overlooked that, under our legislation, increases of actual rentals being received on September 1, 1942, are prohibited, and that applies to all property. While it is true that in some cases the actual rent being received in September, 1942, is less and in some cases greater than would be fixed under the legislation, those are disparities that can be adjusted on fixing the rateable value. The same kind of difficulty was met in England. Again I quote *Witton Booth on Valuations for Rating*, 3rd Ed. 110:

"Assume, however, that over the bulk of the properties in the district, under the Rent Restrictions Act, the increases generally in the standard rentals are less than the maximum permissible, i.e., say an average of 30 per cent. instead of the specified maximum of 40 per cent. Assume that some properties have had the full maximum increases to the rentals, whilst, with others, landlords have not raised the rentals more than half the maximum percentage permissible.

"In such a case, again following the ordinary rules of rating, as properties having had only an average of 30 per cent. rental increases comprise the bulk, the rentals thereof will form the standards for comparisons in rating, and therefore those having had maximum rental increases for rating purposes must be reduced onto the appro-

"prate comparable standard, whilst others with rental increases below such standard will be likewise raised thereto."

It has been pressed upon the Court that to take into consideration the effect of the restrictive legislation would tend to defeat uniformity in rating. There is never complete uniformity in any assessment. I do not understand why, by taking into consideration the effect of the restrictive legislation, there should be less uniformity than there is if it is not taken into consideration. Undoubtedly there will be anomalies. So there are to-day. There always have been, and there always will be.

If, as I understand it, it is argued that, in spite of the restrictive legislation, much higher rents are being paid by tenants and received by landlords than are justified under the Fair Rents Act or the Economic Stabilization Regulations, the answer appears to be that, by receiving rents which are irrecoverable at law, the persons who receive them are breaking the law. It would be unfortunate if the Court allowed itself to be persuaded that the "rateable value" of property should be raised for that reason. That would only tend towards further breaches, because landlords would wish to avoid the burden of heavier rates by getting greater rentals.

As to the argument addressed to the Court on behalf of the City Valuer that, if the valuer is to have regard to the fair rent of property under the restrictive legislation, then that involves working a system which is based upon capital values, and that nowhere in the Rating Act or in the authorities could reference be found to any obligation imposed upon the valuer to determine capital value before determining annual rental value: granted there is no obligation cast upon the valuer to determine capital value before determining rental value. Neither is there any obligation cast upon a valuer to adopt any particular method or system in arriving at the figure which he says represents the hypothetical rent which the hypothetical tenant would be prepared to pay for the privilege of beneficial occupation.

Various methods are adopted by valuers in arriving at annual value. The best known, perhaps, is the comparative method. This is the one used by the City Valuer in the present case. It is most effective where, in the "higgling of the market," rentals are governed by the normal law of supply and demand, and parties are free to arrive at their own bargain. There it is likely that over particular areas, or in respect of particular types or classes of buildings, one can fix with a fair amount of certainty—looking always at the individual property to be assessed—by comparison with others, what the hypothetical rental ought to be. But, where the law of supply and demand is clogged or hampered by restrictive legislation, the comparative method does not appear to provide so reliable a guide.

Now, even where the comparative method is practised, it is not unusual for valuers to test or check their figures by reference to capital value: See *Witton Booth on Valuations for Rating*, 3rd Ed. 131, speaking upon "Methods of Valuation." After having dealt with the comparative method of arriving at gross value, or, to use our term, annual value, by reference to the capital value, he says:

"Sometimes this method is used in addition to the comparative method—the one as an alternative to the other—and in this way with many properties a useful test is provided if due allowances are made, as dealt with presently. Such a test is particularly advisable where there is any doubt as to the reliability of tests drawn by comparison."

In certain classes of business or undertakings, the method of arriving at annual value on the basis of capital value may prove more reliable. This method is commonly used in the case of public utilities and premises where there is no sound basis of comparison: see on this the following cases, *Liverpool Corporation v. Chorley Union Assessment Committee and Witnell Overseers* ([1911] 1 K.B. 1057), *Liverpool Corporation v. Llanfyllin Assessment Committee* ([1899] 2 Q.B. 14), and *R. v. London School Board* ((1885) 55 L.J.M.C. 33).

It may well be that, because the law of supply and demand as between landlord and tenant is not to be allowed free play, the Legislature, by means of the Fair Rents Act and the Economic Stabilization Regulations, has sought to provide a method of fixing rentals by reference to capital value as a means of giving to a landlord a fair return upon his investment. It certainly provides a fair method for determining rental values in all cases where premises are let for the first time after September, 1942.

It has also been argued that anomalies would arise in cases where the fair rent is governed by questions of hardship between landlord and tenant under the Fair Rents Act. The answer is that in such cases the rent is based on exceptional conditions, and such rentals could, for the purpose of arriving at annual values under the Rating Act, be disregarded, since they do not provide satisfactory *prima facie* evidence of actual rental values. However, hardship is only one of the matters which the Court has to weigh under the Fair Rents Act, and what the Court is directed under the Act to do is to fix a fair and equitable rental after taking all other circumstances, as well as hardship, into consideration. And, of course, under the Economic Stabilization Regulations, questions of hardship between landlord and tenants are not to be regarded at all.

I now turn to consider the MacDuffs, Ltd., and A. and W. Smith, Ltd., properties. In those cases, the City Valuer proceeded upon the comparative basis, comparing them with a number of properties in areas nearby. He did not take into consideration the effect of the restrictive legislation. In my view, he was bound to give weight to that. I do not think there is any force in the argument that other ratepayers did not object to their assessments. Once objectors can show that in arriving at the annual value the City Valuer has omitted to give weight to a matter which in my opinion he should give weight to, then their objection is good.

I do not think it is possible to fix a definite percentage in the case of every property by which valuations can be reduced by reason of the restrictive legislation. Each property must be separately looked at: see per Scrutton, L.J., in *Ladies Hosiery and Underwear, Ltd. v. West Middlesex Assessment Committee* ([1932] 2 K.B. 679): "It is 'a vital principle of the law of rating that each hereditament should

"be independently assessed" (*ibid.*, 686). To do otherwise would be to do what *Sankey, J.*, in *Stirk and Sons, Ltd. v. Halifax Assessment Committee* ([1922] 1 K.B. 264) called placing a "fancy figure" in the valuation list (*ibid.*, 273). In that case a valuation list had been made and a general increase of 25 per cent. added to the gross and net values in the list. *Sankey, J.*, said, speaking of what had been done by the Assessment Committee: "All that they have done is to pass a resolution that a fancy figure should be placed opposite to each particular hereditament in the valuation list. When I say 'fancy figure' I do not at all use the word 'fancy' in an offensive sense; I use it in this sense—that they have not considered any individual hereditaments. All that they have done is to consider classes of hereditaments, 'not individual hereditaments'" (*ibid.*, 273).

So, if a valuer were to reduce or increase all the figures fixed as the rateable values on properties by a percentage reduction or increase, that would be wrong.

I think that there will be cases in which the fixation of a fair rent for either dwelling or business premises will provide a fairly reliable guide as to what the hypothetical tenant would give. In those cases, such rentals will be very useful in fixing annual values.

In both *MacDuffs, Ltd.*, and *A. and W. Smith, Ltd.*, cases, I had no evidence that fair rent had been fixed for either of the premises, or for any other premises the rentals of which were cited by way of comparison. Some figures were given as to the Government valuation in 1936 on the *MacDuffs, Ltd.*, property. This I regard as quite unreliable. I was also given a figure placed upon *Smith's* property for mortgage purposes in 1945, and this was admitted to be a conservative valuation. I do not think I can regard it as very useful. I was, however, given a figure at which portions of the *A. and W. Smith, Ltd.*, buildings are at present let and have been let for some time. This figure was 4s. 2½d. per sq. ft. *MacDuffs* and *Smith's* property are adjoining, and the City Valuer himself regarded them as being comparable for the purpose of rating. I adopt that view. I amend the assessments and reduce them as follows:—

MacDuffs, Ltd.: £990 rateable value.

A. and W. Smith, Ltd.: £1,622 10s. rateable value.

Now, with regard to *Feltex*. I agree with Mr. Harcourt's view that the Railway Avenue and Bell Road properties cannot be dealt with fairly on the comparative method. Neither of these properties is comparable with the storage space taken by the Government at 2s. 6d. per sq. ft., or the *Ryan Carrying Co.*'s storage space. Nor are they comparable with a number of very much smaller premises such as the *Dux Co.* or the *Cunningham Carrying Co.*, which were cited. I think Mr. Harcourt's method of approach to the valuation of these properties was the correct one. He checked his figures by a reference to the cost to the company and the capital value. With regard to the *Gracefield Road* property, the City Valuer, Mr. Leighton, and Mr. Harcourt are in agreement that this can only be described as a "jerry-built" place. It stands upon swampy ground. Its floors are not capable of holding heavy machinery. The premises were built for a special purpose, and the floors are uneven—deliberately so. I think the assessment placed

upon the building, which has to be looked at as it stands and not as it could be altered or dealt with by a prospective tenant, is too high. I fix the assessment on the Feltex properties at:

Railway Avenue	£2,800 rateable value.
Bell Road	£5,460 rateable value.
Gracefield Road	£650 rateable value.

With regard to costs: as the objectors have all succeeded, I allow the following costs: MacDuffs, Ltd., and A. and W. Smith, Ltd., £10 10s. for the two; Felt and Textiles, Ltd., £10 10s., with witnesses' expenses to be agreed upon by the parties in respect of the valuations called, or, failing agreement, to be referred to me.

Solicitors for Lower Hutt City Corporation: *Bunny and Gillespie* (Lower Hutt).

Solicitors for the objectors MacDuffs, Ltd., and A. and W. Smith, Ltd.: *Hogg and Stewart* (Wellington).

Solicitors for the objectors Felt and Textiles, Ltd.: *Biss and Cooper* (Wellington).

DWAN TRUSTEES v. LOWER HUTT CITY CORPORATION.

1947. May 1, 23, before Mr. A. M. GOULDING, S.M., at Lower Hutt.

Rates and Rating—Annual Value—Hotel Lease Renewal—Payment of Premium treated by Law as Rent spread over Renewal Period—Properly taken into Consideration in Assessing Rateable Value—"Rateable value"—Rating Act, 1925, ss. 2, 20—Economic Stabilization Emergency Regulations, 1942 (Serial No. 1942/335), Reg. 20.

The lessee-licensee of an hotel held premises under a lease dated October 20, 1938, at a rental of £22 10s. a week: and, on expiry of that lease, he secured a further lease on payment of £2,000 by way of premium or goodwill, treated as rent spread over the period of the lease as £30 4s. a week.

In assessing the rateable value of the property, the City Valuer took into consideration the amount of premium or goodwill paid for the renewal of the lease.

On objection by the lessors,

Held, That the City Valuer was right in so making his assessment, as the hypothetical rent which a hypothetical tenant would pay for a lease of hotel premises is influenced by the fact that the premises carry with them both a license under the Licensing Act, 1908,

and a goodwill by reason of the trade carried on in them; and, further, the hypothetical tenant must be deemed to take into consideration the requirements of Reg. 20 of the Economic Stabilization Emergency Regulations, 1942, which compels the landlord who receives a premium or goodwill payment to treat it as rent.

Dunedin City Corporation v. Young ((1941) 4 N.Z.L.G.R. 72) and *Poplar Assessment Committee v. Roberts* ([1922] 2 A.C. 93) followed.

Perpetual Trustees, Estate, and Agency Co. of New Zealand, Ltd. v. Wilson ([1945] N.Z.L.R. 755) and *Toohey's, Ltd. v. Valuer-General* ([1925] A.C. 439) distinguished.

OBJECTION by lessors to assessment under the Rating Act, 1925, on the annual value.

The lessee and licensee of the Railway Hotel, Lower Hutt, held premises under lease dated October 20, 1938, at a rental of £22 10s. per week. Upon expiry of that lease, the lessee, on payment of £2,000 by way of premium or goodwill, secured a further lease for five years. The new lease was actually signed in June, 1944. Normally, the rent would have remained at £22 10s. per week as provided by the original lease. But, by virtue of Reg. 20 of the Economic Stabilization Regulations, 1942, the goodwill had to be treated as rent spread over the period of the lease, and therefore the actual rent set out in the lease was £130 16s. 8d. per calendar month, equal to £30 4s. per week.

The City Valuer, in assessing the rateable value of the property, had taken into consideration the amount of premium or goodwill paid for the renewal of the lease. The short question was whether he was right in doing so in making his assessment.

Gillespie, for the City Valuer.

Cahill, for the objector.

Cur. adv. vult.

GOULDING, S.M. The definition of "rateable value" is given in the Rating Act: what the valuer has to determine is what hypothetical rent would be paid by a hypothetical tenant for a tenancy for more than a year but liable to be put an end to by notice: see *Dunedin City Corporation v. Young* ((1941) 4 N.Z.L.G.R. 72) and *Poplar Assessment Committee v. Roberts* ([1922] 2 A.C. 93).

A variety of factors must be taken into consideration in assessing this hypothetical rent. I have already in a recent decision held that the effect of the Economic Stabilization Regulations is one of such factors. Regulation 20 of those regulations compels the landlord who receives a premium or goodwill payment to treat it as rent. I do not think that is unfair.

In England, it is admitted that, in assessing the rateable value of properties, the value of the license of a public-house is taken into consideration. So also is goodwill: see *Ryde on Rating*, 8th Ed. 848 *et seq.*

I am invited to hold that, by reason of the decisions in *Perpetual Trustees, Estate, and Agency Co. of New Zealand, Ltd. v. Wilson* ([1945] N.Z.L.R. 755) and *Toohy's, Ltd. v. Valuer-General* ([1925] A.C. 439), the value of a license, or the amount paid by way of goodwill for that license, is not to be taken into consideration in fixing the annual value under the Rating Act.

I do not think that these decisions compel me to come to that conclusion. The only question which arose in the *Perpetual Trustees* case ([1945] N.Z.L.R. 755) was as to the construction to be put upon certain words on a particular lease of land with the buildings thereon. It is true that the premises were hotel premises carrying a hotel license. The lease contained provision for renewal under which valuations were to be made (a) of all the buildings and improvements then on the said land; (b) of the fair annual ground rent of the said land only without any buildings or improvements. The Court of Appeal held that, in a case of this kind, unless it appears from the terms of the lease that the hotel license has to be taken into consideration in fixing the fair annual ground rental, the rental must be based upon the land alone in its fair or unimproved state.

In the judgments both of *Kennedy, J.*, in the lower Court and of the Court of Appeal, there are expressions which show that in certain cases, though not in the one then under consideration, the value of a license will be taken into account in considering the annual ground rental. *Kennedy, J.*, says: "Of course, a bidder at the auction would bid a figure which took into consideration what he had to pay on the buildings and, assuming the value of them was in his view the real value, the sum he would bid would doubtless take into account the land and license and not merely bare land" (*ibid.*, 758).

That appears to be sound reasoning from the point of view of a hypothetical tenant. He would take into consideration the value of the license. I cannot see why the City Valuer should not do the same.

In *Toohy's* case ([1925] A.C. 439), the question arose as to the meaning of the term "unimproved value" in the Valuation of Land Act, 1916 (New South Wales), and the whole question was as to whether or not the improvements made upon the land had any bearing upon unimproved value. *Lord Dunedin*, who delivered the judgment of the Judicial Committee, says, after setting out the relevant section in the Act: "Words could scarcely be clearer to show that the improvements were to be left entirely out of view. They are to be taken, not only as non-existent, but as if they never had existed . . . What the Act requires is really quite simple. Here is a plot of land; assume that there is nothing on it in the way of improvement; what would it fetch in the market?" (*ibid.*, 443).

The question which confronted the Court in that case was entirely different from the one which arises from the definition of "rateable value" in the Rating Act. I have no doubt whatever that the hypothetical rent which a hypothetical tenant would pay for a lease of hotel premises is influenced by the fact that those premises carry with them a license under the Licensing Act and a goodwill by reason of the trade carried on upon them.

By virtue of the Economic Stabilization Regulations, the goodwill is to be spread over the lease in the form of rent, and the hypothetical

tenant must, I think, be deemed to take into consideration the requirements of the law. He knows that, if he pays goodwill, it will be payable in the form of rent.

I think the assessment must stand and the objector must pay costs, which I fix at £3 3s.

Solicitors for the City Valuer : *Bunny and Gillespie* (Lower Hutt).

Solicitors for the objector : *Devine, Crombie, and Cahill* (Wellington).

[IN THE SUPREME COURT.]

WOOD *v.* HAY.

SUPREME COURT. New Plymouth. 1947. April 17; September 26.
CORNISH, J.

By-law—Municipal Corporation—Discharging Firearm prohibited in Borough without Permit—Validity—Dog running at large in Borough Among Sheep—Destroyed by Shooting—By-law not repugnant to Dogs Registration Act, 1908—Dogs Registration Act, 1908, s. 26.

A by-law of a borough that prohibits the discharge of a firearm within the borough without a permit, and under which a permit to use a firearm may be obtained without fee, is not invalid as being repugnant to s. 26 of the Dogs Registration Act, 1908, which provides that any owner of sheep may destroy any dog running at large among such sheep.

APPEAL under s. 303 of the Justices of the Peace Act, 1927, from the conviction of the appellant by Mr. W. S. Woodward, S.M., of discharging a firearm without a permit within the Borough of New Plymouth, contrary to By-law No. 63 made in 1915. The facts alleged in the prosecution were admitted.

Middleton, for the appellant. The appellant should not have been convicted for a breach of By-law No. 63 of the New Plymouth By-laws, 1915, because that by-law is repugnant to s. 26 of the Dogs Registration Act, 1908. The dog was running "at large" within the meaning of that section, and no permit to shoot it was necessary. The dog-owner's control must be effective: *In re an Application for Mandamus*(1). As between the owners, the shooting was lawful: *Wright v. Sharpe*(2). Accordingly, the Borough has no power to whittle away the right to shoot worrying dogs given to the owner of sheep by s. 26 of the Dogs Registration Act, 1908; and any by-law purporting to do that is repugnant to s. 26, and invalid.

(1) (1886) 3 T.L.R. 24, 25.

(2) (1901) 20 N.Z.L.R. 629.

J. P. Quilliam, for the respondent. Reliance is placed on the by-law, which is a valid one. The right of a sheep-owner to shoot dogs that are worrying his sheep is not taken away by it; but it regulates the exercise of that right by requiring that the person exercising it within the borough has a permit. The by-law accordingly controls, within the borough, the exercise of the right given by s. 26 of the Dogs Registration Act, 1908, but does not infringe it in any respect. The permit may be had without fee, so no tax is imposed.

Middleton, in reply, refers to *Miller v. McCarthy*(3), which shows that any additional burden placed by a by-law on a dog-owner in the exercise of a statutory right is repugnant to the statute conferring that right, and is void.

Cur. adv. vult.

CORNISH, J. The appellant was rightly convicted unless excused by s. 26 of the Dogs Registration Act, 1908, which provides that any owner of sheep may destroy any dog running at large among such sheep. Appellant was an owner of sheep and found a small dog running among them. I am satisfied that it was running at large, as it was out of sight and control of the two boys who were supposed to be in charge of it. Small as the dog was, its activity could not be regarded as harmless. Appellant had, therefore, a right to destroy it, and to do so by the most effective means—*viz.*, shooting.

It was contended on behalf of appellant that the by-law was invalid as being repugnant to s. 26 of the Dogs Registration Act, 1908. I do not think that this contention is sound. Section 26 of the Dogs Registration Act, 1908, means only that an owner of sheep may shoot an offending dog without incurring liability to pay damages to its owner. This right is not affected by the by-law. The lack of a written permit does not expose appellant to an action for damages by the former owner of the dog. As between the two owners, that of the sheep and that of the dog, the shooting was lawful. As permits to use firearms can be got without fee, it cannot be suggested that the by-law imposes a tax on persons exercising the right given them under the Dogs Registration Act, 1908.

The appeal should, in my opinion, be dismissed, but without costs, for two reasons—*viz.*, (a) the place where the offence was committed was in an outlying part of the Borough—in a gully between open fields where there were no houses or other inhabited buildings nearby; (b) the policy of the Council has apparently been not to take action for breach of the by-law against sheep-owners (of whom there is a considerable number within the Borough), who have acted under s. 26 of the Dogs Registration Act, 1908. Indeed, the Council, acting through the Chief Inspector, has preferred to acquiesce in their invoking this section rather than to issue permits to them under the by-law. It has been thought that, in this way, the indiscriminate use of firearms within the Borough would be the more effectually restrained.

However, this was not a prosecution by the Council. In my opinion, the Magistrate was right in holding that there had been a breach of the by-law; and his judgment is affirmed.

Appeal dismissed.

Solicitors for the appellant: *Monaghan and Middleton* (New Plymouth).

Solicitors for the respondent: *Govett, Quilliam, and Hutchen* (New Plymouth).

[IN THE MAGISTRATES' COURT.]

POLICE v. SMITH.

1947. October 17, 28, before Mr. H. J. THOMPSON, S.M., at Wellington.

By-law—Street Processions—Prohibition except pursuant to Permit by Mayor—Repugnancy—Ultra Vires—Municipal Corporations Act, 1933, s. 368 (a).

A by-law of the Wellington City Corporation was in the following terms:—

“Any person shall be guilty of an offence against this by-law who . . . (61) Takes part in any procession whether “vehicular or pedestrian or partly vehicular and partly pedestrian “or of any other type whatsoever in along or upon any street “private street or public place otherwise than pursuant to the “authority of and in conformity with the terms of a permit “previously issued in writing under the hand of the Mayor.”

In a prosecution charging the defendant with taking part in a procession upon a street otherwise than pursuant to the authority of and in conformity with the terms of a permit issued under the hand of the Mayor,

Held, That the by-law was repugnant to the laws of New Zealand, and so invalid under s. 368 (a) of the Municipal Corporations Act, 1933.

Ex parte Lewis ((1888) 21 Q.B.D. 191), *Beatty v. Gillbanks* ((1882) 9 Q.B.D. 308), *Lowdens v. Keaveney* ([1903] 2 I.R. 82), *Toronto Municipal Corporation v. Virgo* ([1896] A.C. 88), *Melbourne Corporation v. Barry* ((1922) 31 C.L.R. 174), and *Martin v. Smith* ((1933) N.Z.L.R. 636) followed.

Police v. Anderson ((1934) 29 M.C.R. 76) referred to.

INFORMATION charging the defendant under the Wellington City Consolidated By-law No. 1, 1933, Part I, s. 1 (61), with taking part in a procession upon a street, to wit, Lambton Quay, otherwise than pursuant to the authority of and in conformity with the terms of a permit issued in writing under the hand of the Mayor.

Shortly after noon on July 30, 1947, a procession of about three hundred persons, headed by the defendant, who was carrying a placard bearing the inscription “Hands off Indonesia,” marched three and four abreast through Brandon Street, along Featherston Street via Grey Street into Lambton Quay, and along Lambton Quay into Panama Street, where they collected in front of the entrance to the D.I.C., in which is situated the Dutch Consulate.

The procession was an orderly one, with eight or nine people carrying banners. It marched at a rapid speed of about four miles an hour, and the Police witnesses stated that they saw no signs of riotous behaviour. During the course of the procession, traffic was impeded to some extent, and a complete blockage of traffic was caused in Panama Street when the procession stopped of its own volition. Some noise occurred at this stage.

No permit had been granted by the City Council for any procession to be held on the date in question. The Council did not require permits to be obtained for funeral processions, for school "crocodiles," or for a party of Police being marched through the streets by their sergeant.

The defendant and nine others appeared charged with taking part in the procession without a permit, and, on the application of Mr. *Taylor*, it was decided to proceed with the charge against the defendant as a test case, and to consider the questions of law submitted in his behalf before the remaining cases should be heard.

For the defendant, Mr. *Taylor* submitted that no permit was required, because the by-law is invalid and of no effect, for the following reasons—

(i) It is repugnant to the laws of New Zealand (Municipal Corporations Act, 1933, s. 368 (a)).

(ii) It is *ultra vires* the powers of the municipal corporation, to wit, the Wellington Municipal Corporation, as granted under the Municipal Corporations Act, 1920 or 1933.

(iii) It is unreasonable, and therefore *ultra vires* :

(a) Because it is unequal in its operation as between different classes, and involves such gratuitous interference with the rights of the subject as can find no justification in the minds of reasonable men.

(b) Because, by delegating the power to permit or refuse the exercise of a common-law right to the Mayor of the Corporation, it leaves the law (i) uncertain, and (ii) arbitrary and subject to the whim of an individual.

N. R. Taylor, for the defendant.

Cur. adv. vult.

THOMPSON, S.M. [After stating the facts, as above:] By-law 61, under which the present charge is laid, occurs in Part I of the Wellington City Consolidated By-law No. 1, 1933, the heading of this Part being, "General Provisions as to Streets, Private Streets, and Public Places." It reads :

"Any person shall be guilty of an offence against this by-law who . . . (61) Takes part in any procession whether vehicular or pedestrian or partly vehicular and partly pedestrian or of any other type whatsoever in along or upon any street, private street or public place otherwise than pursuant to the authority of and in conformity with the terms of a permit previously issued in writing under the hand of the Mayor."

"Street" and "public place" are defined in the interpretation clause, but no question is raised by the defence concerning the fact that the procession took place in a "public place."

The first submission of the defence is that the by-law is invalid as repugnant to the law of New Zealand, in that it is the common-law right of every citizen to use the roads for passing and re-passing.

Section 368 (a) of the Municipal Corporations Act, 1933 (hereinafter called "the Act"), provides :

"The powers of making and enforcing by-laws shall be subject to the following limitations and provisions :—

"(a) A by-law shall not be valid if manifestly repugnant to the laws of New Zealand or the provisions of this Act."

In support of this submission, Mr. *Taylor* refers to :—

(a) *Ex parte Lewis* (1888) 21 Q.B.D. 191, 197). This case dealt with the right of the public to occupy Trafalgar Square for the purpose of holding public meetings, and it was held that the Commissioners of Works and Public Buildings, in whom the control and regulation of the Square was vested, had power to prohibit the holding of such meetings there.

In dealing with an allegation that the rights to use the Square rested on "dedication," *Wills*, J., stated : "It is, however, a species of dedication at present unknown to the law, and of which there is no trace in our law books. The only 'dedication' in the legal sense that we are aware of is that of a public right of passage, of which the legal description is a 'right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance'" (*ibid.*, 197).

(b) *Melbourne Corporation v. Barry* (1922) 31 C.L.R. 174). This case was heard in 1922 in the High Court of Australia on appeal from the Supreme Court of Victoria. Section 197 of the Local Government Act, 1915 (Vict.), provided that by-laws may be made by any municipality for :

"(22) Regulating traffic and processions . . . (37) Generally for maintaining the good rule and government of the municipality."

Section 6 of the Police Offences Act, 1915 (Vict.), provided that :

"Any local authority may from time to time make rules and regulations for the route to be observed by all carriages carts vehicles and persons and for keeping order in the carriage and footways and public places and for preventing any obstruction thereof whether by the assemblage of persons or otherwise."

A by-law of the City of Melbourne provided that :

"No processions of persons or of vehicles . . . shall, except for military or funeral purposes, parade or pass through any street unless with the previous consent in writing of the Council given under the hand of the Town Clerk and by the route specified in such consent, and unless and until the recipient of such consent has given at least twenty-four hours' notice with particulars of such consent and route to the officer in charge of the City Police."

By a majority verdict, the High Court held that the by-law was not authorized either by s. 197 of the Local Government Act or by s. 6 of the Police Offences Act. In the course of his judgment, *Isaacs*, J., deals, at pp. 189, 190, with the case of *Toronto Municipal Corporation v. Virgo* ([1896] A.C. 88), and the statement of Lord *Davey* that "there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power

"to regulate and govern seems to imply the continued existence of that which is to be regulated or governed" (*ibid.*, 93).

[After citing from the judgment of *Isaacs, J.* (1922) 31 C.L.R. 174, 196, 197, 198, 199, 200), and from the judgment of *Higgins, J.* (*ibid.*, 206, 207, 208), the learned Magistrate proceeded:]

(c) In *Martin v. Smith* ([1933] N.Z.L.R. 636), in giving judgment, in which three other members of the Court concurred, *MacGregor, J.*, stated: "According to the law of New Zealand, all streets in a borough are vested in the Corporation in fee-simple, and all such streets are under the control of the Council: s. 172 (1) and (2). Under s. 172 (4) (f) the Council has power to determine what part of a street shall be a carriage-way, and what part a footway only, and under s. 172 (4) (k) it has power also to 'enclose and plant any part of a street.' By s. 354 of the Act the Council is authorized to make by-laws for (*inter alia*) all or any of the following purposes:

"1. The good rule and government of the borough:

"6. Protecting any property belonging to the Corporation, or controlled by the Council, from damage or injury:

"18. Concerning streets and the use thereof, and the construction of anything upon, over, or under a street.

"It is in reliance on these statutory provisions that this by-law is now sought to be supported. But a by-law, in order to be valid, must be (a) *intra vires* of the authority who makes it, (b) not repugnant to the law of the land, (c) certain in its terms and positive, and (d) reasonable: see 26 *Halsbury's Laws of England*, 2nd Ed. 604, 605, 606. When the terms of this particular by-law are closely scrutinized, it will, in my opinion, be found not to comply with some, if not all, of these requirements.

"Under the Municipal Corporations Act the City Council has wide powers relating to their streets, but these powers are defined by the statute, and must not be exercised in such a way as to interfere unduly with the paramount rights of the general public to the use of these streets as highways. In the present case it appears to me that the by-law in question does interfere with this primary right of the public. It is true that by s. 172 (4) (k) the Council has power to 'enclose and plant' any part of a street, but it clearly appears from the statement of facts that the so-called 'grass plots' are not 'enclosed and planted,' but are merely portions of the public highway, unenclosed, on which grass has been encouraged to grow. This by-law in terms purports to prohibit any member of the public from riding, driving, or leading any horse or other animal, or riding, driving, or wheeling any vehicle or motor along or across those grassed portions of the public highway. Such a by-law, in my opinion, is *ultra vires* of the City Council, and also repugnant to the law of New Zealand. I think also the by-law is unreasonable and at the same time uncertain in its terms.

"The law relating to local-body by-laws of this type was thoroughly discussed by the Full Court in *McCarthy v. Madden* (1914) 33 N.Z.L.R. 1251. The joint judgment of *Denniston, J.*, and *Edwards, J.* (*ibid.*, 1268, 1270), lays down certain general principles which control and govern the validity of such a by-law. In my judgment the

"present by-law does contravene these guiding principles. As we have already seen, it does interfere with the general right of the public to the free use of the whole width of the streets in question" (*ibid.*, 640, 641).

(d) *Police v. Anderson* (1934) 29 M.C.R. 76. [After quoting the headnote:] In the course of his judgment, *Stout*, S.M., says: "This it will be seen is a prohibition for *all time* of anything in the nature of a procession. It would include weddings, funerals, Girl Guides and Boy Scouts marching in formation, the Salvation Army band and followers, the children of an orphanage or home, walking in pairs to church or even a few friends walking in twos down a street, or several Chinamen walking in single file. It is therefore an unreasonable interference with the rights of the public. In addition, in my opinion, the language used to define the traffic it purports to stop is too vague and indefinite. Where public rights are sought to be restricted the language should be definite" (*ibid.*, 76, 77).

I do not propose to deal with the two other main submissions made by Mr. *Taylor*, as I am of opinion that the authorities already cited amply support his contention that the Wellington by-law is repugnant to the laws of New Zealand and so invalid under s. 368 (a) of the Municipal Corporations Act, 1933.

The position may be briefly summarized as follows:—

It is the common-law right of every citizen to use the roads for passing and repassing: *Ex parte Lewis* (1888) 21 Q.B.D. 191).

A procession passing along a public thoroughfare is, to begin with, no more than a number of individuals exercising in the aggregate the individual right of each to pass along the thoroughfare. It is not necessarily unlawful in any way: *Melbourne case* (1922) 31 C.L.R. 174, 196). See also *31 Halsbury's Laws of England*, 2nd Ed. 684, para. 1015:

"To organize, or take part in, a procession along a highway is not necessarily an improper use of such highway. Apart from any statute or authorized regulations, the test of legality is whether in all the circumstances such procession is a reasonable use of the highway, and not whether it is likely to lead to an obstruction: *Beatty v. Gillbanks*, (1882) 9 Q.B.D. 308; *Lowdens v. Keaveney*, [1903] 2 I.R. 82."

Even if a corporation is given power to "regulate" processions, or make by-laws "concerning streets and the use thereof," such powers do not extend to the "prohibiting" of processions completely: *Toronto Municipal Corporation v. Virgo* [1896] A.C. 88).

The powers given in the Municipal Corporations Act, 1933, must not be exercised in such a way as to interfere unduly with the paramount rights of the general public to the use of these streets as highways: *Martin v. Smith* [1933] N.Z.L.R. 636).

The Wellington by-law, under which defendant is charged, purports to prohibit completely:

"[the] taking part in any procession whether vehicular or pedestrian or partly vehicular and partly pedestrian or of any other type what-

"soever in along or upon any street, private street or public place
"otherwise than pursuant to the authority of and in conformity
"with the terms of a permit previously issued in writing under the
"hand of the Mayor."

No greater infringement on the right of citizens to use the streets for the purpose of lawful processions could well be imagined. As pointed out by *Stout*, S.M., in *Police v. Anderson* ((1934) 29 M.C.R. 76), this is a prohibition for all time of anything in the nature of a procession, and would include weddings, State or private funerals, Police or Girl Guides or Boy Scouts marching in formation, Salvation Army band and followers, school crocodiles, and a few friends walking in orderly pairs down the street, or even several Chinese or Indians walking in single file.

I agree entirely with the statement of the learned Magistrate that :
"The law in New Zealand is the same as that in Britain, namely—
"That persons are entitled to demonstrate and hold processions to
"publicly air their views, or bring them before the authorities so long
"as the meetings are orderly and peaceful. This is a cherished right
"of the British nation and should not be lightly interfered with or
"curtailed" (*ibid.*, 77).

In the present proceedings, it was admitted by the Police witnesses that the procession was an orderly one.

I must hold, therefore, that the by-law is unreasonable as well as repugnant to the laws of New Zealand, and is invalid.

Without further comment, I also draw attention to the apparently unfettered power given to the Mayor to permit or prohibit processions at his whim.

The information against defendant is accordingly dismissed.

Information dismissed.

Solicitors for the defendant : *Duncan, Matthews, and Taylor* (Wellington).

MCCORMICK ET UX. v. PENINSULA MOTOR SERVICE.

1947. September 29, 30, before Mr. H. W. BUNDLE, S.M., at Dunedin.

Carriers—Bailor and Bailee—Passengers in Passenger-service Suburban Bus—No Charge made for Luggage—Suitcase placed in Receptacle in Bus as indicated by Bus-owner's Official—Suitcase missing at Destination—Liability of Bus-owner—Common Carrier or Bailee.

Two passengers, husband and wife, travelled by bus from Dunedin to Portobello, some thirteen miles, during the Easter

holidays. They paid ordinary passenger fares, and no charge was made for their luggage. The defendant company, owner of the bus, had a passenger-service license. The passengers' suitcase was placed in a box at the rear of the bus at the suggestion of an official of the defendant company. On arrival at their destination the suitcase was missing.

In an action claiming the value of the suitcase and its contents from the company,

Held, 1. That, whether the bus-service company was purely a passenger carrier, without the passenger having the right to take personal luggage on its bus, is a question of fact in each particular case.

Hodge v. Wellington City Corporation (1943) 4 N.Z.L.G.R. 288) and *Munro v. Auckland Transport Board* (*Ante*, p. 180), distinguished.

2. That, on the facts, the liability of the defendant company was that of a common carrier in respect of the luggage carried by a passenger who had paid his fare.

3. That, whether the liability of the defendant company was that of a carrier or that of a gratuitous bailee, it was responsible for the loss of the suitcase and its contents.

CLAIM by passengers in a bus running from Dunedin to Portobello for the value of luggage lost during the journey.

The following facts were proved or admitted. On April 3, 1947 (Thursday before Easter), the plaintiffs went to Portobello to stay there during the Easter holidays. They travelled by a bus leaving Queen's Gardens, Dunedin, at 9.45 p.m. and belonging to the defendant company, which is the holder of a passenger-service license from Dunedin to this district. They paid ordinary passenger fare; no charge was made for luggage. They had as luggage a haversack and a suitcase described by Mrs. McCormick as being a lady's companion. It was an awkward size to place in the rack inside the bus in which most luggage is placed. It was placed by her husband in a box on the rear outside of the bus. At the suggestion of counsel, the Magistrate inspected the bus and was shown the box in which the luggage was placed. It has a wooden flap, which is hinged to fall outside, and, when shut, is held by a catch. He found that a suggestion was made by an official of the defendant company that the luggage should be placed in the box. The bus had not, as many buses have, an outside compartment at the rear for the carriage of luggage and goods. Mr. McCormick described how he undid the flap, placed the luggage in, and did up the flap, or, as may be said, closed the catch. The official of the bus company had not been identified by plaintiff. He was not the driver of the bus, who arrived from another bus shortly before departure. The luggage was placed in the custody of the defendant company. One other passenger, Mrs. Morgan, was putting some luggage in the outside box when the driver came along. The driver knew her as Mrs. Morgan and knew that she was a passenger for Challis's, a stop some miles on the

Dunedin side of Portobello. There was no evidence that any other luggage was placed in the box. On arrival at Challis's, the driver of the bus let Mrs. Morgan off. She mentioned something about a parcel, and he remembered it was in the box. He was going to get out of the bus to take the parcel out, but Mr. Morgan, who had apparently met his wife, called out to the driver, "O.K., Fred, I'll get it."

On the arrival of the bus at Portobello, the plaintiff's suitcase was not in the box, which was open and the side door not snibbed. The plaintiff complained to the driver, who took him back in the bus to Macandrew Bay (between Challis's and Portobello). No trace of the suitcase was seen on the road. The driver lent the plaintiff a cycle to go to Challis's and went after him to assist in the search, but without result. The plaintiff's luggage had not been recovered.

K. W. Stewart, for the plaintiffs.

E. J. Anderson, for the defendants.

Curr. adv. vult.

BUNDLE, S.M. [After stating the facts, as above:] There can be no question that the box on the side of the bus, whether called a tool-box or not, is in fact used by some passengers for carrying their luggage. On the evidence of the company's officials, it is just as clear that no objection is generally raised, but the driver sometimes asks passengers to take it inside. On occasions, according to the evidence of the driver of the bus, half the luggage would not go inside, and he has personally supervised the carrying of it on the side in the tool-box.

It is a little difficult to determine the extent of liability of the defendant company for passengers' luggage.

The motor-buses operated by the defendant company carry on a passenger service from Dunedin to Harrington Point, a distance of eighteen miles. The distance to Portobello is thirteen miles. A number of residents in the localities served by defendant's buses reside permanently, while some reside there only at holiday periods. The plaintiffs were on holiday. Such temporary residents or visitors must, of necessity, take with them a certain amount of personal luggage.

Passengers carried by the old stage-coaches were by custom allowed to carry with them a certain amount of luggage, and all railway companies in England were bound to carry passengers' luggage to a certain amount without extra charge. Evidence that defendant company carried passengers' luggage was given on behalf of the company. This was not a gratuitous bailment, as the fare charged the passenger was deemed to include the carriage of the luggage. The liability of the stage-coach proprietor or the railway company was, in respect of passengers' luggage, that of a common carrier. Within the boundaries of a residential area, such as that served by trams, it is not necessary for the passenger to carry luggage. Is the defendant company purely a passenger-carrier, without the passenger having any right to take personal luggage? This, I think, must be a question of fact in each particular case. The facts of the case under review differ very materially from those both in *Hodge v. Wellington City Corporation* ((1943) 4 N.Z.L.G.R. 288) and in *Munro v. Auckland Transport Board* (*Ante*, p. 180).

I think, considering all the facts, that the liability of the defendant company is that of a common carrier in respect of the personal luggage carried by a passenger to Portobello who has paid his fare. On the facts I have found proved, I am of the opinion that, as luggage was lost during the journey after having been delivered to the defendant company, the company is liable for its loss. Had the suitcase been placed or taken inside the bus by the plaintiffs and there remained in their own control and possession, this wide liability of the common carrier founded on bailment of the goods would not apply. In such case, the duty of the defendant company would be met if no negligence on its part were proved.

Assuming that I have misdirected myself, and that the defendant company was not a common carrier of the luggage, its liability would then be limited to that of a gratuitous bailee, and the plaintiffs must prove that the defendant company was negligent. The luggage was, I have found, placed inside the box on the outside of the bus by the direction of a servant of the defendant company. That this was not unusual in the opinion of the drivers is shown by the fact that Mrs. Morgan, another passenger, placed luggage in the box. When this passenger got off at Challis's, she or her husband opened the box and took out the luggage. This was done with the knowledge of the bus-driver, who was in control of the bus. The driver did not trouble to see that the box was properly secured when he drove off from Challis's. On his own admission, "Drivers of Bus 21 have been given instructions to see 'that the snib is fastened before leaving Queen's Gardens.'" If it is the driver's duty to see that the snib was secured before leaving Dunedin, why did he not assure himself this had been done before leaving Challis's? Failure to secure the box meant that any luggage or even tools which were in the box were liable to be thrown out on the road when the bus was in motion. This failure was clearly an act of gross negligence, and was the direct cause of the suitcase being lost.

Whether the liability of the defendant company be that of a carrier or that of a gratuitous bailee, it must be held responsible for the loss of the suitcase. I accept the value of same and the contents as claimed. Advertising (4s.) is special damage, and is not proved. Judgment for plaintiffs for £15 12s. 11d. Court costs £1 11s., and solicitor's fee, £2 12s.

Judgment for the plaintiffs.

Solicitors for the plaintiffs: *Brent, Anderson, and Stewart* (Dunedin).

Solicitors for the defendant: *Webb, Allan, Walker, and Anderson* (Dunedin).

MARTIN v. KENT.

1948. January 19, February 2, before Mr. J. H. LUXFORD, S.M., at Auckland.

Road Traffic—Offences—Failure to yield Right of way to Pedestrian within Authorized Pedestrian-crossing—Pedestrian stationary on Crossing—"Yield the right of way"—Traffic Regulations, 1936 (Serial No. 1936/86), Reg. 14 (7).

The purpose of Reg. 14 (7) of the Traffic Regulations, 1936, is to give pedestrians who use an authorized crossing the right of way against motor-vehicles, and it merely requires the driver to refrain from doing anything which prevents or interferes with a pedestrian continuing on his way across the road at the same pace and in the same direction. If, therefore, the driver complies with that requirement, he may still be said to have yielded the right of way by changing the course of his vehicle to enable it to pass either in front of or behind the pedestrian.

In view of the definition of the term "right of way" in Reg. 2, a driver cannot be said to have failed to yield the right of way when the pedestrian stops on the crossing, unless it was reasonably necessary in the interests of his personal safety to do so, as the wording of the regulation presupposes a pedestrian in motion, and not a stationary pedestrian.

Rhind v. Irvine ([1940] 2 W.W.R. 333) distinguished.

INFORMATION charging the defendant with failing to yield the right of way to a pedestrian engaged in crossing Khyber Pass Road within an authorized pedestrian-crossing.

Khyber Pass Road runs east and west and is intersected by a road-way called Nugent Street on the south and Grafton Road on the north. An authorized pedestrian-crossing has been established across Khyber Pass Road along an area which, to all intents and purposes, connects the eastern footpaths of Nugent Street and Grafton Road.

The defendant was driving his car in a westerly direction along Khyber Pass Road and was approaching the Nugent Street intersection. A tram-car was also approaching the intersection in the same direction. A number of children were standing at the intersection. Two or three of them were standing on the south end of the crossing, about 1 ft. to 18 in. from the kerb, the others were on the kerb. The motorman in charge of the tram-car, thinking the children wished to cross to the north side of Khyber Pass Road, stopped the tram-car before it reached the crossing. The defendant, thinking that the children were waiting for his car and the tram-car to pass, sounded his horn and proceeded on his way. When the car's horn was sounded, the children on the crossing stepped back to the footpath. The children did, in fact, intend to cross the road, and did so after the defendant had passed over the crossing, and the tram-car had stopped. No evidence was called to show how long the children had been on the crossing. The defendant, however, stated that he sounded his horn as a precautionary measure because one or two of the children had their backs towards the direction from which he was approaching.

Horrocks, for the defendant.

Cur. adv. vult.

LUXFORD, S.M. [After finding the facts, as above:] The purpose of the regulation is to give pedestrians who use an authorized crossing the right of way against motor-vehicles, but not against non-motor-

vehicles such as tram-cars, bicycles, and horse-drawn vehicles. Regulation 14 (7) makes it an offence if the driver of a motor-vehicle fails to yield the right of way to a pedestrian engaged in crossing the roadway within any authorized crossing upon the half of the roadway over which the vehicle is lawfully entitled to travel. The regulation also places on the driver the obligation to reduce his speed when approaching a crossing, so as to be able to stop before reaching the crossing, if necessary.

The gravamen of the offence is the driver's failure to yield the right of way. There is, unfortunately, some misconception of the meaning of the expression "yield the right of way." It is defined by Reg. 2 to mean "the right of precedence in continuing on a course." This right does not arise under Reg. 14 (7) unless a collision is likely if both the pedestrian and the motor-vehicle continue on their respective courses. The regulation, in my opinion, merely requires the driver to refrain from doing anything which prevents or interferes with a pedestrian continuing on his way across the road at the same pace and in the same direction. If, therefore, a driver complies with this requirement, he may still be said to have yielded the right of way, by changing the course of his vehicle to enable it to pass either in front of or behind the pedestrian. In the Canadian case of *Rhind v. Irvine* ([1940] 2 W.W.R. 333), *Dysart, J.*, construed the expression to mean that, when the pathway of a car and that of a pedestrian cross each other, the car-driver has the duty of avoiding a collision. That seems to me too narrow a construction to apply to Reg. 14 (7), because of the special definition to which I have already referred. A driver, however, cannot be said to have failed to have yielded the right of way when the pedestrian stops on the crossing, unless it was reasonably necessary in the interests of his personal safety to do so. In my opinion, the regulation does not apply where a pedestrian is unnecessarily stationary on a crossing. The pedestrian has the right of precedence in continuing on his course, and that presupposes a pedestrian in motion, not a stationary pedestrian.

Many pedestrians in the city of Auckland cause a great deal of embarrassment to motor-drivers. They step from the kerb to the crossing and, seeing a vehicle approaching, suddenly decide to stop, although the vehicle has slowed down in order to yield the right of way. Some drivers then stop, and signal the pedestrian to go on; others increase speed and proceed on their way. Fear that the motor-vehicle will not stop is the reason for the pedestrian's hesitancy. No great trouble arises if the pedestrian remains stationary, but it may be otherwise if he changes his mind at the same time as the driver decides to increase speed and proceed on his way. Pedestrians should realize that they commit an offence by remaining on an authorized crossing longer than is necessary for the purpose of crossing the roadway with reasonable despatch. It would be in the interests of public safety if they understood better their rights and obligations when using a pedestrian-crossing. It would be particularly helpful for all concerned if they made it a practice, when stepping on to a crossing towards which a vehicle is approaching, to extend the right arm in a forward direction. This practice would very quickly ensure to them the right of way to which they are entitled, and put an end to the fears so many of them seem to have when using an authorized crossing.

In the present case, the children were at all material times stationary on the crossing. There is no evidence as to when they stepped on to the crossing. Consequently, the obligation on the defendant to yield a right of way to the children never arose, and the information must be dismissed.

Information dismissed.

Solicitors for the defendant: *Holnden and Horrocks* (Auckland).

[IN THE SUPREME COURT.]

WAIMAIRI COUNTY v. RUTHERFORD.

SUPREME COURT. Christchurch. 1947. November 18; December 17.
FLEMING, J.

Local Authorities—County transferring its Electrical Supply Department to City Corporation—Power given by Statute to pay Gratuities to Servants on Retirement from its Service—No Power in County to charge its Electrical Account with Pay for Leave of Absence granted to County's Employees in its Electrical Supply Department as from Date of the Taking-over of such Undertaking by City—Finance Act (No. 2), 1941, s. 6 (2) (3)—Waimairi County Electrical Supply and Christchurch City Empowering Act, 1945 (L), s. 6.

A local authority which is discontinuing its business has no implied power to give gratuities to its workers; but such power is expressly given, without limitation on the nature of their retirement, by s. 6 (2) of the Finance Act (No. 2), 1941.

Hutton v. West Cork Railway Co.(1) applied.

Cyclists' Touring Club v. Hopkinson(2) and *Wimbledon and Putney Commons Conservators v. Tuelly*(3) referred to.

Pursuant to the Waimairi Supply and Christchurch City Empowering Act, 1945, the electrical supply undertaking of the County was transferred to the Christchurch City Corporation. The transfer operated and took effect on April 1, 1946. Notwithstanding an informal assurance by the Corporation to the County before the transfer that none of the staff or employees engaged in the County's electrical supply department should suffer any financial loss, and that the Corporation would provide employment for them, the County, purporting to act under s. 6 of the Finance Act (No. 2), 1941, granted gratuities to six of its employees, who had served the County in its electrical supply department for over ten years. These gratuities were paid out of the Electrical Supply Account three days before the account vested in the Corporation.

The County also granted leave of absence on full pay to other employees who had served it in the same department for less than ten years, such leave to run from April 4, 1946. The amount of this pay was also paid out of the Electrical Supply Account.

The Controller and Auditor-General considered the gratuities illegal, on the ground that the six employees were not retiring, and denied the right of the County to charge the amounts of the gratuities or the leave of absence pay to the Electrical Supply Account prior to April 1, 1946.

Held, 1. That the six workmen who received the said gratuities received them on their retirement from the service to the County; as the transfer of the undertaking to the Corporation did not and could not transfer the work-

(1) (1883) 23 Ch. D. 654.

(2) [1910] 1 Ch. 179.

(3) [1931] 1 Ch. 190.

men, and the Corporation was not the successor to the County, but a distinct and separate entity.

2. That the payment of the said gratuities, amounting to six months' wages to each of the six workmen, was legally made by the County; but the County was not justified in charging to its Electrical Supply Account the pay of the employees on leave of absence from April 1, 1946, as on that date the County could no longer employ servants in its electrical supply department, which it had ceased to own, and the amount of such payments must be refunded to the City Corporation.

ORIGINATING SUMMONS, brought by arrangement between the County and the Controller and Auditor-General, to determine the following questions:

1. Was the Council of the County of Waimairi authorized by s. 6 of the Finance Act (No. 2), 1941, to pay to certain employees gratuities upon such employees leaving the service of the said Council? 5

2. Was the Council of the County of Waimairi justified in charging to its electrical account to be taken over by the Christchurch City Council under the Waimairi County Electrical Supply and Christchurch City Empowering Act, 1945, the pay of certain employees covering a period of leave of absence granted to them? 10

Before April 1, 1946, the Waimairi Power Board was nominally the controlling authority for the Waimairi Electric-power District, but, by arrangement with the plaintiff County, the Board's functions were carried out by plaintiff County. The County, for the purpose, had an electricity department, and, as required by law, kept a separate account for this undertaking. The County district was a large one, and included a considerable area of urban land on the outskirts of Christchurch City. Acute feeling arose in the area as to the desirability of this function being performed by the County, and, as a result, the County Council arranged with the Christchurch City Council for the transfer to the City of the electrical supply undertaking of the County, and the powers, duties, and obligations of the County in connection therewith. 15 20

This led to the passing of an Empowering Act known as the Waimairi County Electrical Supply and Christchurch City Empowering Act, 1945. Pursuant to this Act, a poll of the County electors was taken on March 2, 1946, and resulted in favour of the proposed transfer of the undertaking to the Christchurch City. 25

Under the Act, the powers, duties, and obligations of the County were conferred and imposed on the City, as from April 1, 1946; and all the assets of the County in connection with its electrical supply undertaking "and all moneys belonging to the Electrical Supply Account of "the County" vested in the City. The City also assumed all obligations, engagements, and liabilities of the County in respect of the undertaking, and indemnified the County in respect of loans, contracts and engagements, and claims in respect of any torts alleged to have been committed by the County, or the Board, in the exercise of their respective powers. The Act also dissolved the Board, and abolished the Waimairi Electric-power District. 30 35

It was admitted that, before the transference, the City gave informal assurances to the County that none of the staff or employees engaged in the electrical supply department of the County should suffer any financial loss, and that the City would provide employment for them. Notwithstanding this assurance, the County, purporting to act under s. 6 of the Finance Act (No. 2), 1941, granted gratuities to six of its employees, who had served the County in its electrical supply department for over 40 45

ten years. These gratuities amounted to £907 5s., and were paid out of the Electrical Supply Account on or about March 28, 1946—that is, three days before the Account vested in the City. The County also granted leave of absence on full pay to other employees who had served it in the same department for less than ten years, such leave to run from April 1, 1946. The pay for these employees for their periods of leave amounted to £217 7s. 11d., and this also was paid out of the Electrical Supply Account.

The Controller and Auditor-General considered the gratuities illegal, on the grounds that the six men who received these payments were not retiring, but were continuing their services to a “successor” local authority. He did not question the right of the County to grant leave of absence on full pay, but denied the right of the County to charge the amounts to the Electrical Supply Account prior to April 1, 1946, on the ground that the leave of absence did not commence until that date.

One man, J. Gregor, who received a gratuity of £74 15s., actually remained in the employ of the County for some time after April 1, 1946. The amount was drawn from the Electrical Supply Account, and held in a suspense account until Gregor left the employ of the County, when it was paid to him.

Hutchison, for the Waimairi County. The Waimairi Electrical Supply and Christchurch City Empowering Act, 1945 (L), came into force on April 1, 1946: see ss. 5, 7, 8, under which the County’s obligations, engagements, and liabilities were taken over by the City Corporation. The employees’ work in the County’s electrical supply department ceased on March 31, 1936

As to Question 1. By resolution, the County granted gratuities of six months’ pay to six long-service men. Two men with ten years’ service received one week’s wages for each year of service, and leave of absence on full pay was given to men who had not served ten years. The gratuities were paid out of the County’s electricity account. The wages to men on leave were paid on March 28, 1946. The change over to the Corporation was made on April 1, 1946. The Corporation had intimated that it would take over the electricity staff by letter dated March 21, 1946.

The County’s power to grant leave of absence on full pay is implicit; there is no statutory authority on this point. Section 6 (3) of the Finance Act (No. 2), 1941, is an enabling clause, not a restrictive one: see s. 127 of the Public Revenues Act, 1926, and *Craies on Statute Law*, 4th Ed. 68 (e), 71 (c). The County, as an employer, had an implied power to grant gratuities: *Wimbledon and Putney Commons Conservators v. Tuelly* (1) and *Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool), Ltd.* (2). There is no difference between a man going to private employment and a man going to successors: *Victoria University College Council v. Attorney-General* (3). The word “on” means “at or about,” and “retirement” means “the ceasing of a job otherwise than by dismissal for misconduct”: cf. s. 13 of the Judicature Act, 1908; and ss. 38 *et seq.* of the Public Service Superannuation Act, 1927. Section 39 of the Finance Act, 1930 (No. 2), imposes penal consequences on Councilors. The answer to Question 1 should be: “Yes.”

(1) [1931] 1 Ch. 190, 195.

(3) [1926] N.Z.L.R. 135.

(2) [1947] A.C. 1, 14, 15; [1946] 2 All E.R. 345, 350.

As to Question 2: The payments were reasonable. As to the accounts to be kept, see ss. 137 and 138 (2) (b) of the Counties Act, 1920. The answer to the second question should be: "Yes."

A. W. Brown, for the Auditor-General. The Finance Act (No. 2), 1941, and the Waimairi County Electrical Supply and Christchurch City Empowering Act, 1945 (L), determine the questions; by the latter, the undertaking of the County's electricity department was transferred to the City, the County being the City's predecessor. Section 6 of the first-named statute must be read as a whole. Subsection 2 provides in certain circumstances that gratuities may be paid "on the retirement." The word "retirement" means "the ending of service." Where a local authority's function is taken over by another local authority, there is no retirement, as the former's functions are transferred to the second authority; and the first is the predecessor: *Hutton v. West Cork Railway Co.*(4). 5 10 15

The general law of gratuities shows that a gratuity should be paid for some particular purpose; and the expenditure must be justified as an encouragement of employees and an attraction to men of a good type: *Hutton v. West Cork Railway Co.*(5) and *Stroud v. Royal Aquarium and Summer and Winter Garden Society, Ltd.*(6). 20

In a circular distributed by the City Council before the ratepayers' poll, it was stated that the employment of the County's staff would be continued. On the City's taking over the County's electrical supply department account, it was short of the amount paid to the County's employees, the leave-of-absence men. The Auditor-General says that the payments were incurred in respect to the period after April 1, and should not be paid: see *Hivac, Ltd. v. Park Royal Scientific Instruments, Ltd.*(7). 25 30

Lascelles, for the Christchurch City Corporation, adopts Mr. Brown's argument. 30

As to Question 1: Section 6 of the Finance Act (No. 2), 1941, contemplates a retiring gratuity as a reward for services on an employee's retirement from service, which is a positive act on his part; but this is a different thing from the dissolution of an electric-power authority. Retirement must involve some wilful active departure or withdrawal: for instance, the death of a partner is not a retirement: *Huon v. Dougherty*(8). The word "retirement" means "withdrawal from work or "service": 8 *Oxford English Dictionary*, Pt. I, 573; and it is an inapt word to use if the Legislature meant a transfer to a successor. If s. 5 (j) of the Acts Interpretation Act, 1924, is applied here, then, in the present case, an employee would have two retirements: (a) when the County transferred functions; and (b) when the employee retired. Here, it is the same electricity undertaking, with nothing but a change of names. It is admitted that the City Corporation gave a verbal assurance that it would take over the employment of employees of the County. The answer to the first question should be: "No." 35 40 45

As to Question 2: It is not denied that a practice has arisen to grant leave of absence; but the County is not entitled to debit the successor authority for a period of leave which begins after April 1, in an account which concludes with the period before April 1. Such a retro- 50

(4) (1883) 23 Ch.D. 654, 665, 672.

(5) (1883) 23 Ch.D. 654, 670.

(6) (1903) 89 L.T. 243.

(7) [1946] Ch. 169; [1946] 2 All E.R. 350.

(8) (1894) 20 V.L.R. 30.

spective principle of debit is not maintainable; it is a means of acquiring popularity at the expense of the successor. The answer should be: "No."

5 *Hutchison*, in reply. The cases cited on the meaning of "retirement" are not authority here. Mr. *Lascelles* took the word "retirement" out of its context, which is "from the service of any local authority." Such retirement may or may not be voluntary, as the men are free agents to go where they please. As to the second question: All disbursements must be debited to a separate account.

10 *Brown*, refers to s. 8 of the Waimairi County Electrical Supply and Christchurch City Empowering Act, 1945 (L).

Cur. adv. vult.

FLEMING, J. [After stating the facts, as above:] The County relies on s. 6 (2) of the Finance Act (No. 2), 1941, to justify the payment
15 of the gratuities; and on its implied powers as an employer to justify the payment of wages to the employees granted leave of absence.

Section 6 (2) and (3) of the Finance Act (No. 2), 1941, reads as follows:—

20 (2) On the retirement from the service of any local authority of any employee whose total length of service with the local authority has been not less than ten years the local authority may pay to him by way of gratuity an amount not exceeding an amount equal to six months' pay at the rate payable to him at the time of his retirement.

25 (3) For the purposes of this section service with a local authority shall be deemed to include service with any other local authority being the predecessor of the first-mentioned local authority; and a local authority shall be deemed to be the predecessor of another local authority in any case where, on its dissolution or in any other circumstances, its functions or any of its functions have been transferred to such other local authority.

30 With regard to the gratuities, counsel for the defendant, and for the Christchurch City Council, submit that, on the facts stated, there was not "retirement from the service of any local authority." They contend that there was a transference of the electrical functions of the County from one local authority to another. Under s. 6 (3), the County was the
35 "predecessor" of the City, and counsel contend that, by necessary implication, the City was the successor of the County. Mr. *Hutchison*, for the County, contends that the expression "retirement from the service of" should be construed as meaning the quitting of the service of a local authority, either at the instance of the employee or of the
40 employer—except in the case of the death of the employee (for which special provision is made in s. 6 (2A)), or in the case of dismissal for misconduct.

Let us consider the powers of a local authority, or similar employer, with respect to the payment of gratuities to workers, prior to the enact-
45 ment of s. 6 (2) and (3). In *Cyclists' Touring Club v. Hopkinson*(1), *Swinfen Eady*, J., held that the club could grant a pension by way of gratuity to a retired secretary, although there was no express power to do so in the club's memorandum of association. The learned Judge states: "In my opinion, the payment to a retired servant of the club
50 "by way of an annuity, or by way of pension, or by way of gratuity, is "within the powers of the club as being a payment in furtherance of the "best objects of the club. The fact that the payment is made by way of

(1) [1910] 1 Ch. 179.

"gratuity and not under any legal liability does not make it a payment outside the objects of the club"(2).

In *Wimbledon and Putney Commons Conservators v. Tuely*(3), Bennett, J., held that the Conservators, having power to levy rates and employ labour in order to carry out its undertaking, could provide pensions, annuities, or superannuation allowances for employees retiring by reason of age, infirmity, or otherwise, notwithstanding that they had no express power. The learned Judge states: "I can find no sound ground upon which the present case or the position of the Conservators can be distinguished from the position of the Cyclists' Touring Club. These pensions or superannuation allowances seem to me to be, on the evidence, payments which will secure for the Conservators servants of the most desirable type and are therefore payments made to secure the efficient performance of the duties which the Act of Parliament throws upon the Conservators"(4).

These cases, and others to the same effect, make it clear that a local authority has implied powers to make provision for, or gratuities to, retiring workers for the purpose of attracting desirable workers to its employ. But there must be this definite purpose, or some advantage to be anticipated by the employer or party making the payments. Thus, in *Hutton v. West Cork Railway Co.*(5), it was held that a company which had sold its undertaking and was in process of being wound up could not make payments to its directors and servants by way of gratuity for past services. The test applied was that, as the company was being wound up, the payment of gratuities was not reasonably incidental to its business. This case is mentioned with approval in the later cases.

It would appear, therefore, that a local authority or corporation which is discontinuing its business has no implied powers to give gratuities to its workers.

In my opinion, the power conferred by s. 6 (2) of the Finance Act (No. 2), 1941, is much wider than the implied powers. Were this not so, the legislation would not have been necessary. It is clearly intended to enable a local authority to reward a faithful servant on his leaving the service of the local authority. There is no limitation on the nature of the retirement, as, for instance, age, or infirmity. Nor does the subsection mean retirement from work. It distinctly states "retirement from the service of any local authority." Even if the servant is leaving to better his position, the local authority may still reward him for his past faithful service, to the extent sanctioned by the subsection. If the servant dies, either before or after his retirement, not having received a gratuity, the local authority may pay the gratuity to his dependants: s. 6 (2A).

The question, then, is: Did these six workmen, who received these gratuities, receive them on their retirement from the service of the County? In my opinion, they were so retiring. The empowering Act of 1945 did effect a transfer of its electricity undertaking from the County to the Christchurch City, with all the assets and liabilities appertaining thereto, but it could not, and did not, transfer the workmen. It was optional to these workmen whether to seek employment with the Christchurch City or not. Nor is the Christchurch City the successor to the County. It is not expressed to be a successor in the Act of 1945 or in the Finance Act (No. 2), 1941. In fact, it is quite a distinct corporation, elected by a totally different constituency, and managed and controlled

(2) [1910] 1 Ch. 179, 187.

(3) [1931] 1 Ch. 190.

(4) *Ibid.*, 195, 196.

(5) (1883) 23 Ch.D. 654.

by quite different people. The County still continues as an entirely separate entity. It ceased to carry on its electricity department on April 1, 1947, and thereupon these six workmen retired from its service.

In the Public Service Superannuation Act, 1927, s. 30 (1) (now repealed by substituted legislation) contains the expression :

no person . . . shall be entitled on his retirement from the Public Service to a retiring-allowance exceeding three hundred pounds per annum.

Section 38 (1) of the same Act contains the words :

If . . . he compulsorily retires from the Public Service for any reason other than misconduct.

Section 39 of the same Act provides that retirement shall not be deemed compulsory :

if at any time within three months before such deprivation he has been offered, and has failed or refused to accept, some other suitable place or office in the Public Service at a salary not less than that of the place or office so held by him.

This legislation, I think, best explains what the legislature meant by "on his retirement from the service of any local authority," in s. 6 (2).

In the Finance Act (No. 2), 1941, there is no restriction or qualification on the right to make the gratuities similar to that in s. 39 above-cited. But for s. 39, any Civil Servant compulsorily retired would have become entitled to his superannuation under the Act.

I think, therefore, that the payment of these gratuities, amounting to six months' wages to each of the six servants, was legally made.

The payment of wages to men on leave of absence, commencing from April 1, 1946, is on a different footing. Here, the County relies on its implied powers. These, no doubt, would have been sufficient had the leave of absence been granted and its term expired prior to the said date. But on that date the County ceased to own its electricity department. It could no longer employ servants in that department. Yet, that is what it purported to do, and it paid them in advance out of its electricity fund.

It is true the County is carrying on its other functions, but, as Mr. *Lascelles* contended, it could not popularize its other services at the expense of the electricity fund, which, on the date in question, became the property of the City. Whether or not the County can charge these payments to its general fund is not before me. It must refund the amount of these payments (£217 7s. 11d.) to the Christchurch City.

The questions submitted to the Court and my answers are as follows :—

1. Was the Council of the County of Waimairi authorized by s. 6 of the Finance Act (No. 2), 1941, to pay to certain employees gratuities upon such employees leaving the service of the said Council under the circumstances set out in the affidavit of Henry Kitson sworn and filed herein? Answer : Yes.

2. Was the Council of the County of Waimairi justified in charging to its electrical account to be taken over by the Christchurch City Council under the Waimairi County Electrical Supply and Christchurch City Empowering Act, 1945, the pay of certain employees covering a period of leave of absence granted to them as set out in the said affidavit— Answer : No.

I order that plaintiff company pay costs £21 and disbursements to the defendant the Controller and Auditor-General, and costs £15 15s. to the Christchurch City Council.

Questions answered accordingly.

Solicitors for the plaintiff: *J. J. Dougal, Son, and Hutchison* (Christchurch).

Solicitors for the defendant: *Raymond, Stringer, Hamilton, and Donnelly* (Christchurch).

Solicitors for Christchurch City Council: *Weston, Ward, and Lascelles* (Christchurch).

TOLLEMACHE *v.* VALUER-GENERAL. TILBY AND ANOTHER *v.* VALUER-GENERAL.

SUPREME COURT. Auckland. 1947. December 12. 1948. February 6. FAIR, J.

Valuation of Land—Farm Land—Effect of Land Sales Legislation on Valuations under the Valuation of Land Act, 1925—Proper Mode of Valuing—Servicemen's Settlement and Land Sales Act, 1943, s. 53 (1) (2).

In answer to the contention that the position of valuations under the Valuation of Land Act, 1925, has been changed by reason of the provisions of the Servicemen's Settlement and Land Sales Act, 1943, and should now be based upon the productive value of the land, excluding any possible price obtainable on subdivision,

Held, That such contention could not be accepted, for, by s. 53 (1) of that statute, the basic value of any farm land "shall be deemed to be the productive value of that land, as ascertained in the manner provided by this section, increased or reduced by such amount as the Land Sales Committee deems necessary in order to make it a fair value for the purposes of this Act"; and what is a "fair value" as defined by s. 53 (2) shows that the valuer must take into account any special value that the land may have because of its locality, and also such other matters affecting the land as the Committee considers relevant.

It was correct to proceed, as the Assessment Court had done, on the basis of first determining the unimproved value in accordance with the directions contained in s. 2 of the Valuation of Land Act, 1925, as modified by the Servicemen's Settlement and Land Sales Act, 1943; and then assessing the value of the improvements in relation to a probable purchaser's requirements in reference to it. That Court was also correct in considering the valuation on the basis of the actual and potential subdivisional value, the decision in *St. John's College Trust Board v. Auckland Education Board*(1) being applicable to the provisions of the Valuation of Land Act, 1925, and to a valuation made thereunder.

(The cases on appeal from the decisions of an Assessment Court were referred back to that Court for findings on certain other matters on which there was a doubt, and for amendment of the cases accordingly.)

St. John's College Trust Board v. Auckland Education Board(1) applied.

(1) (1945) 5 N.Z.L.G.R. 194.

APPEAL from the decision of an Assessment Court on an appeal under the Valuation of Land Act, 1925, against the valuation of the appellant's land at £23,915, comprising unimproved value £14,640 and improvements £9,275.

- 5 The land consisted of an area of 287 acres situated at Otumoetai, near Tauranga. The land comprised an area of (a) six acres facing the main Otumoetai Road, which was suitable for immediate subdivision into smaller areas; (b) a further twelve acres adjoining these six, of much the same quality and in much the same situation, but which were occupied to a large extent by the farm buildings used in connection with the use of the whole 287 acres as a dairy-farm; (c) a level plateau the area of which was estimated in the original valuation at some 130 acres, which had no metalled road access to it, but had an unformed public road leading to the south side, and a narrow road across a causeway on the other side of the block, which was unsuitable for use for the purposes of this area for any present scheme of subdivision; (d) the remainder of the land consisted of a valley of steeply sloping land and a considerable area of reclaimed swamp.

- The last valuation of land was made in 1937, and the unimproved value was then fixed at approximately £3,000. The valuation from which the appeal was made to the assessment Court was, as stated, in the amount of £14,640, and the improvements were valued at £9,275. Upon appeal, the Assessment Court reduced such unimproved value from £14,640 to £13,000, and increased the valuation of the improvements from £9,275 to £10,915.

- The Assessment Court arrived at this valuation by valuing the six acres at £300 an acre: £1,800; the twelve acres at £150 an acre: £1,800; and the balance of the land, 269 acres, at £30 an acre: £8,070. An additional sum of £1,300 was added as the potential subdivisional value of 130 acres at £10 per acre: total £12,970; in round figures, £13,000.

Cooney, for the appellant in each case.

- Tollemache's Case*: The correct method of valuation is (a) to value the land as a farm as it stands, and add the potential value, both as at December 15, 1942: see s. 10 of the Valuation of Land Act, 1925, and s. 57 of the Statutes Amendment Act, 1940. The true capital value, even on the Crown's own showing, is equal to the budgetary value plus £3,550; or the budgetary value plus £3,000. The valuation is excessive, because there have been no sales of subdivisions in the area, and the valuation disregards the differing nature of the land in question.

- Tilby's Cases*: The capital value as assessed by the Court is the selling value of the land. The selling value must be assumed to be the value at which a sale would be approved by the Land Sales Court as on a productive value, plus actual additional special value: so that the value placed on it is to equal that amount. Therefore, the true value of improvements should be subtracted from that value.

- G. S. R. Meredith*, for the respondent in each case. These appeals were brought under s. 28 of the Valuation of Land Act, 1925, and are confined to appeals on point of law—e.g., to cases in which the Assessment Court valued on wrong principles of valuation, or there was no

evidence at all to justify its findings. Here, no question of law arises. The ascertainment of values as contended for by the appellant would be the capital value less improvements, and the difference would be the unimproved value, but that is incorrect. While this would be of advantage to the appellant, since, if the improvements were increased in value, the unimproved value could be reduced, the correct method is the ascertainment of the unimproved value of the land, and the ascertainment of the value of the improvements on land at the date on which the valuation was made. The total equals the capital value: *Thomas v. Valuer-General*(1). The use to which the property is being put is not a consideration to be taken into account: *Colonial Sugar-refining Co. v. Valuer-General*(2). In valuing the buildings, the purpose for which the land is being valued is to be borne in mind: see the definition of "value of improvements" in s. 2 of the Valuation of Land Act, 1925.

Decisions as to awards of compensation for land are in point: see *St. John's College Trust Board v. Auckland Education Board*(3).

Tollemache's Case: There was clear evidence that there was a subdivisional market for certain areas, 18 acres top land were valued at £3,600, and the area of 130 acres had prospective subdivisional value, and was valued accordingly. The remainder was valued at a small figure, as there was no subdivisional value. The Assessment Court accepted this, and acted upon the evidence. The increase in the value of the improvements (£1,640) cannot be attacked here, because there was ample evidence to support that valuation.

Tilby's Cases: The evidence shows that there was a subdivisional market for 30 acres: this was accepted by the Court, and cannot be contested. The balance of the land was valued at a lower figure, and this was accepted by the Court. The Assessment Court can fix the value of the improvements, after hearing the witnesses; and an appellate Court has no jurisdiction to vary its assessment: *Colonial Sugar-refining Co. v. Valuer-General*(4).

Cooney, in reply. If the valuation was made on a wrong basis, that is a question of law. The powers of this Court are set out in s. 31 of the Valuation of Land Act, 1925. It is not bound to remit the case back to the Assessment Court. As to increasing the value of improvements, see *Broadways, Ltd. v. Valuer-General*(5) and *Nightcaps Coal Co., Ltd. v. Valuer-General*(6). *Thomas v. Valuer-General*(7) dealt with the unimproved value of leasehold property, and the considerations now before the Court did not arise there. *Colonial Sugar-refining Co. v. Valuer-General*(8) was a special case, decided on its own facts. The present appeals concern farm property, and the position of valuations of farm land under the Valuation of Land Act, 1925, is now modified by ss. 53 and 54 of the Servicemen's Settlement and Land Sales Act, 1943, and such valuations should be based solely on productive value, exclusive of subdivisional value. Productive value takes into account the full value of the improvements, which may decrease in value as the years go by. The full burden of the increase is not to be taken from the appellant at once. It is admitted that the principles enunciated in the *St. John's*

(1) [1918] N.Z.L.R. 164, 171.

(2) [1927] N.Z.L.R. 617, 625, 626, 627.

(3) (1945) 5 N.Z.L.G.R. 294, 300.

(4) [1927] N.Z.L.R. 617.

(5) [1923] N.Z.L.R. 245.

(6) (1906) 25 N.Z.L.R. 977, 984.

(7) [1918] N.Z.L.R. 164.

(8) [1927] N.Z.L.R. 617.

College Trust Board v. Auckland Education Board(9) apply to the provisions of the Valuation of Land Act, 1925, and to valuations made thereunder.

Cur. adv. vult.

TOLLEMACHE'S CASE.

- 5 FAIR, J. That the Assessment Court was right in considering the valuation on the basis of its actual and potential subdivisional value appears from the decision in *St. John's College Trust Board v. Auckland Education Board*(1), which Mr. Cooney for the appellant rightly admits is applicable to the provisions of the Valuation Act, and a valuation
10 made thereunder. But he submitted further that the decision of the Assessment Court was erroneous in law on various grounds: First, that there was no evidence upon which the Assessment Court could found that decision. It would appear from the decision in *Colonial Sugar-refining Co. v. Valuer-General*(2) that this first point may not be
15 open. Assuming, however (without in any way deciding), that this question is open, it seems to me, upon a consideration of the case, that it is clearly untenable. There was ample evidence in the evidence given by Mr. De Latour before the Assessment Court to support the valuations made of the different parts of the farm. It was suggested that the
20 increase in the valuation of the improvements was made by the Assessment Court simply by transferring to the valuation of the improvements the amount by which the Court had reduced the unimproved value. The amount of this addition may well, however, be a mere coincidence. In any case, it does not provide any legal ground for challenging the
25 Court's decision. It may represent the Court's opinion of the correct calculation of the improvements, for they seemed to be severely reduced in the original valuation. That, possibly, was due to the fact that a number of them were on the 12 acres which were valued at £150 an acre because of their suitability for subdivision. In any case, there seems no
30 ground for saying that there is no evidence upon which the Court could have arrived at its decision.

- It is to be noted, too, that the onus of proving that the valuation is wrong is, by s. 27 of the Valuation of Land Act, 1925, upon the objector. The evidence given by his main witness, both as to area and value, was
35 based, as to area, upon information as to the areas of the respective types of land given by the appellant, and not checked by the valuer. Moreover, the valuation was based upon its value as a farm, apart from the subdivisional value of those areas that could immediately be subdivided and sold, or any potential subdivisional value.

- 40 The second ground urged in support of this appeal was that the position of valuations under the Valuation of Land Act had been changed by reason of the provisions of the Servicemen's Settlement and Land Sales Act, 1943, and should now be based upon the productive value of the land, excluding any possible price obtainable on subdivision; but this
45 contention cannot be accepted, for, by s. 53 (1) of that Act, the basic value of any farm land:

- shall be deemed to be the productive value of that land, as ascertained in the manner provided by this section, increased or reduced by such amount as the Land Sales Committee deems necessary in order to make it a fair value for the purposes of
50 this Act.

What is a fair value is defined by subs. 2 of that section, which, so far as it is relevant to the present question, provides:

(9) (1945) 5 N.Z.L.G.R. 294.

(2) [1927] N.Z.L.R. 617, 621, 622.

(1) (1945) 5 N.Z.L.G.R. 294.

In determining whether it is necessary to make any increase or reduction in the productive value as aforesaid the Land Sales Committee shall consider . . .

(c) Any special value that the land may have by reason of its locality :

(d) Such other matters affecting the land as the Committee considers relevant.

Clearly, in a valuation, the valuer must take into account, as Mr. De Latour has done, both these matters. Clearly, too, a Land Sales Committee or Land Sales Court was never intended to oblige an owner to sell land at far below its ordinary market value in December, 1942. It was contended by Mr. Cooney that the Assessment Court did not base its value of the farm other than the 18 acres on the productive value. But there seems to be no sufficient ground for accepting this submission of fact : and the Assessment Court may well have arrived at its own opinion of the productive value of the 269 acres as £30 per acre in view of Mr. Jordan's uncertainty as to the area included in the plateau ; and then added about £4,900 for actual and potential subdivisional values of the 18 and the 130 acres respectively. But these questions involve a consideration of questions of fact which this Court is precluded from considering. It certainly cannot assume that the Assessment Court ignored the budgetary basis : and the facts do not support the contention that it did. It appears, therefore, that this ground for the appeal also fails.

Then it was contended on behalf of the appellant that the Assessment Court was erroneous in law in not arriving at the value by first assessing the capital value based on the budget representing the basic value, and deducting therefrom the value of the improvements as they stood upon the land. From what I have said above, it would appear that the first proposition cannot be accepted, as it would limit the valuation in a way contrary to the intention of the Servicemen's Settlement and Land Sales Act.

The Assessment Court has proceeded on the basis of first determining the unimproved value in accordance with directions contained in s. 2 of the Valuation of Land Act, as modified by the Servicemen's Settlement and Land Sales Act, 1943, and then assessing the value of the improvements in relation to a probable purchaser's requirements in reference to it. The decision in *Broadways, Ltd. v. Valuer-General*(3) indicates that, in the case of part of the land being subdivided, the land, in certain cases, should be valued as a whole, and the roading and drainage construction considered as improvements to the whole block. That, I think, was a special case, which may not be applicable to this case, which must be governed (as the parties agree) by the decision in the *St. John's College* case(4). Whether or not in certain cases the most satisfactory method of arriving at the unimproved value is by first ascertaining the capital value and then ascertaining the value of improvements as defined by the Act and deducting them as was done in *Nightcaps Coal Co., Ltd. v. Valuer-General*(5) is, too, a matter that does not require determination in the present appeal.

In *Thomas v. Valuer-General*(6) *Hosking, J.*, says : " The other point involved in the appeal is that in ascertaining the value the valuer proceeded on a wrong basis in that he had first fixed and determined the unimproved value and thereafter had fixed the value of the improvements, and by the addition of the two values had ascertained the capital value. It is said this process is wrong, and that he should first ascertain the capital value and then deduct the value which the improvements

(3) [1923] N.Z.L.R. 245.

(4) (1945) 5 N.Z.L.G.R. 294.

(5) (1906) 25 N.Z.L.R. 977.

(6) [1918] N.Z.L.R. 164.

"add to the land. I do not quite see how the method adopted by the valuer is a matter of law unless it must end in a wrong conclusion. If the result is right, does it matter whether he adds from the top or the bottom? If his result is wrong, then upon an appeal it is open to be attacked on evidence whichever method he has adopted. What he has to find, however, is not the value of the improvements but the added value which at the date of valuation the improvements give to the land—that is to say, to the unimproved value of the land. I cannot see how the valuer went wrong in principle because he first found the unimproved value and then added the value given by the improvements"(7).

Moreover, this is the view that has the most general concurrence: see *Collins on the Valuation of Land*, 87 et seq., citing *Knor, C.J.*, in *Kiddle v. Deputy Federal Commissioner of Land Tax*(8), applying *Toohy's Ltd. v. Valuer-General*(9) and decisions of the High Court of Australia. The position in relation to such land as this was summarized in *New Zealand and Australian Land Co. v. Minister of Lands*(10), where *Williams, J.*, said in reference to the principles to be applied by a Compensation Court: "All that we have to do is to ascertain the fair selling-value of the land taken, assuming it to be sold in one lot or in parcels, as might be most advantageous to the owner at the time the value has to be estimated"(11).

As to the contention there was no sufficiently definite evidence as to the area available for possible future subdivisions, the only definite evidence was Mr. De Latour's. The Assessment Court accepted it; and that decision cannot be said to be erroneous in law, nor, I think, if the facts were open to review, in fact. The improvements were put at a relatively low value by the valuer and the Assessment Court, owing to the fact that they were of rather less value in relation to the 269 acres than when used for the whole 287 acres.

But there is one finding upon a question involving both law and fact to which, as I mentioned during the argument, the statement of the decision of the Assessment Court does not specifically refer, and as to which there seems a real doubt. The Assessment Court was, as I have already said, in my view correct in law in including in the value of the 18 acres and the 130 acres their present and potential subdivisional values respectively. But, in considering the productive and selling value of the area of 269 acres—i.e., the 287 acres less 18 acres—it does not appear whether it decided whether some of the buildings necessary for its working were on the 18 acres and so would be unavailable to a purchaser of the 269 acres.

If there were on the 18 acres buildings necessary for working the balance of the land as a farm, then the cost of their removal or the erection of new buildings would affect the price a purchaser would be likely to pay, and also the productive value of this area: see *No. 73.—P.T. to S.*(12). In the present case, it seems probable that that was the position; but it is uncertain whether the Court adverted to this factor in assessing the unimproved value of this area. If it did not, then it misdirected itself as to the law, and should reconsider its valuation of this area.

If it did take this matter into consideration, in the manner indicated in *No. 73.—P.T. to S.*(13), in arriving at its valuation, then its decision was not erroneous in law, and cannot be called in question on an issue of fact.

(7) [1918] N.Z.L.R. 164, 175, 176.

(8) [1920] 27 C.L.R. 316.

(9) [1925] A.C. 439.

(10) (1895) 13 N.Z.L.R. 714.

(11) *Ibid.*, 716.

(12) (1946) 22 N.Z.L.J. 67.

(13) (1946) 22 N.Z.L.J. 67.

The case on appeal as presented does not enable this question to be determined, and it seems desirable that it should be referred back to the Assessment Court to amend the case by stating whether it did advert to and determine this fact in arriving at its valuation of the 269 acres.

If it did not, then it should reconsider its decision as to the value of this area in the light of this factor, and amend the case by stating what difference it makes to the valuation.

The case on appeal will be remitted to the Assessment Court for amendment accordingly.

TILBY'S CASES.

FAIR, J. These are appeals from the decision of the Assessment Court sustaining valuations of three areas of approximately 55 acres each of land owned by the appellants near Tauranga, one member of the Court dissenting.

The grounds upon which it was argued that the decisions were erroneous in law were much the same as were advanced in *Tollemache's case*(1). It is unnecessary for me to repeat what I have said in my judgment in that case, as the general principles stated there apply to these cases.

There was evidence before the Assessment Court that there was a ready sale in December, 1942, and at the present date, for some 30 acres of land, in each area of 55 acres, for subdivision, at prices which were fully supported by examples of sales of neighbouring land. Ample allowance seems to have been made for the costs of roading and subdivision, and loss of value of improvements which were more useful when the whole area was used as one farm. The balance of 20 acres was valued at a reasonably low rate for use as a farm. But it is uncertain whether the effect on the value of the loss of the farm buildings on the land saleable in subdivisions was considered, and these appeals must also be referred back for similar findings in respect of these cases.

Solicitors for the appellant: *Cooney and Jamieson* (Tauranga).

Solicitors for the respondent: *Meredith, Kerr, and Cleal* (Auckland).

(1) *Ante*, p. 296, l. 32.

[IN THE MAGISTRATES' COURT.]

WHITTAKER v. SHAW.

1947. November 25, December 23, before Mr. S. L. PATERSON, S.M., at Cambridge.

Impounding—Offences—Rescue of Impounded Cattle—Statutory Requirements as to Pound not complied with—Impounding illegal—Impounding Act, 1908, ss. 30, 33, 34, 48 (1).

Justices—Jurisdiction—Poundkeeper of Town Board Informant—Information taken and Summons issued by Board Secretary as Justice—Invalidity of Information—Waiver by Defendant—Justices of the Peace Act, 1927, ss. 55, 56, 57.

The conditions precedent to the notification of premises as a public pound, prescribed by s. 30 of the Impounding Act, 1908, are not complied with if sufficient means of shelter are not provided for the animals impounded therein. The failure to comply with the requirements of s. 23 of the statute—in that the poundkeeper did not keep a copy of the statute, and the scale of fees was not posted upon the gate or some conspicuous part of the pound in compliance with s. 34, and the use of half the premises for storing machinery removed the means of shelter for stock or the provision of means for segregating infected cattle—rendered illegal the impounding of cattle in the alleged pound.

Shire of Ayr v. Parravicini, Ex parte Parravicini ((1931) 25 Q.J.P.R. 122; 19 *Australian Digest*, 576), followed.

Consequently, an information against the defendant charging him, under s. 48 (1) of the Impounding Act, 1908, with rescuing an impounded horse from the public pound in question was dismissed.

The informant was the poundkeeper for the Leamington Town Board, and the information was taken and the summons issued by the secretary of that Board. The defendant did not object at the hearing.

Held, That the issue of the taking of the information and the issue of the summons by the secretary of the Town Board, of which the informant was poundkeeper, was sufficient to invalidate the information, were it not for the fact that there had been a waiver by the defendant in not raising that objection at the hearing.

Whitten v. Pennell ([1918] N.Z.L.R. 762) and *Reg. v. Richmond, Surrey, Justices* ((1860) 8 Cox C.C. 314) followed.

INFORMATION charging the defendant under s. 48 (1) of the Impounding Act, 1908, with rescuing certain impounded cattle—to wit, one horse—from the public pound of the Leamington Town District.

S. Lewis, for the informant.

Lundon, for the defendant.

Cur. adv. vult.

PATERSON, S.M. The informant is the poundkeeper for the Leamington Town Board, and I notice in passing that the Justice before whom the information was taken and who issued the summons is the secretary of the same Board. This would be sufficient to invalidate the information (see *Whitten v. Pennell* ([1918] N.Z.L.R. 762)) if it were not for the fact that there has been a waiver by the defendant in not raising that objection at the hearing: see *Reg. v. Richmond, Surrey, Justices* ((1860) 8 Cox C.C. 314).

Mr. *Lundon*, for the defendant, raises a defence on the merits that the defendant did not rescue or attempt to rescue the animal concerned, but that the informant voluntarily handed it to him on his promise to pay the fees the next day. There appears to be some basis for this

contention on the evidence, but I do not propose to consider that aspect of the case, because the technical defences also raised by Mr. *Lundon* appear to me to dispose of the matter. He contended that the impounding was illegal because the pound did not comply with the conditions precedent to its notification as a public pound, prescribed by s. 30 of the Impounding Act, 1908, in that it did not provide sufficient means of shelter for the animals impounded therein. He also contended that the poundkeeper did not keep a copy of the Act, as required by s. 33, and that a scale of fees was not posted upon the gate or some other conspicuous part of the pound in manner prescribed by s. 34 of the Act, and that the failure to comply with these statutory requirements made the impounding illegal, and, therefore, there could be no rescue. He quoted no authority for this proposition, and said he could find none, but that it was a principle of law that statutes permitting interference with property must be complied with in order to prevent such interference being unlawful. The Australian case of *Shire of Ayr v. Parravicini, Ex parte Parravicini* ((1931) 25 Q.J.P.R. 122; 19 *Australian Digest*, 576), appears to be an authority that, if the statutory requirements of the Impounding Act are not complied with, the impounding is unlawful, and upon that ground the Court quashed a conviction for rescuing animals otherwise lawfully impounded.

In the present case, the evidence shows that, when the pound was first appointed by the Leamington Town Board, it probably did comply with s. 30, but that since then half of it has been used for storing Town Board machinery and stores and that the remaining half available as a pound does not provide for shelter for stock nor provide means for segregating infected cattle. The notice board is not affixed to the pound and does not set out all fees chargeable, does not show the name of the poundkeeper, and is not painted in the prescribed manner. On account of all these omissions and the failure of the poundkeeper to keep a copy of the Act (the extract pasted on the back of the pound-book is not a compliance with the section), I hold that the impounding was illegal, and that there was no rescue.

Also, while the poundkeeper and the defendant had a heated argument, I do not think the evidence established a rescue. In evidence, the poundkeeper said: "He said he would pay if I let it out. I let it out, and he refused to pay." The defendant denied that he refused to pay, but said that the arrangement was that the poundkeeper was to collect the fees in the morning.

For the foregoing reasons, the information will be dismissed.

Information dismissed.

Solicitors for the informant: *Lewis and Dallimore* (Cambridge).

Solicitor for the defendant: *D. J. Lundon* (Cambridge).

TAYLOR v. STUART.

1947. November 26, December 17, before Mr. A. E. DOBBIE, S.M., at Balclutha.

By-law—Cartage of Timber over County Roads—By-law made by Virtue of Power conferred by Repealed Statute—By-law thereby Abrogated—Transport Law Amendment Act, 1939, s. 12 (5).

The relevant portion of a by-law made by a County was as follows :

“ Every person desirous of carting timber in loads amounting to heavy traffic over any of the roads under the control of the Council shall before commencing to carry on such traffic notify the Council of such desire and shall apply for the Council’s estimate of the damage which such traffic will do to the said road or roads and of the cost estimated by the Council of reinstating the same.

“ No person shall cart or cause or procure to be carted any timber hereinbefore defined in loads amounting to heavy traffic as defined by the Public Works Act, 1928, in or upon any vehicle truck wagon or cart over or upon any of the roads within the County of Clutha and under the control of the Council unless and until the cost as estimated by the Council of reinstating any road or roads is previously paid to the Council by the person desiring so to cart timber over or upon any such road or roads.”

This by-law was made by virtue of the power contained in s. 174 of the Public Works Act, 1928, which was repealed by s. 12 (5) of the Transport Law Amendment Act, 1939, which makes provision as to extraordinary traffic upon County roads and as to the damage thereby caused, but does not empower local authorities to make by-laws, appertaining thereto.

Upon a prosecution by the County for a breach of the by-law,

Held, That, as the by-law was made by virtue of the power vested in the County under s. 174 of the Public Works Act, 1928, and as that section had been repealed, the by-law was abrogated.

The information was dismissed with costs to the defendant.

INFORMATION charging the defendant with a breach of a by-law of the Clutha County Council dealing with the cartage of timber over the County roads. The relevant portions of the by-law in question were as follows :

“ Every person desirous of carting timber in loads amounting to heavy traffic over any of the roads under the control of the Council shall before commencing to carry on such traffic notify the Council of such desire and shall apply for the Council’s estimate of the damage which such traffic will do to the said road or roads and of the cost estimated by the Council of reinstating the same.

"(5) No person shall cart or cause or procure to be carted any timber hereinbefore defined in loads amounting to heavy traffic as defined by the Public Works Act, 1928, in or upon any vehicle truck wagon or cart over or upon any of the roads within the County of Clutha and under the control of the Council unless and until the cost as estimated by the Council of reinstating any road or roads is previously paid to the Council by the person desiring so to cart timber over or upon any such road or roads."

The defendant was charged for that he :

"on the 24th September 1947 at Waiwera South did cart or cause or procure to be carted timber in loads amounting to heavy traffic as defined by the Public Works Act, 1928, in or upon a vehicle truck wagon or cart over or upon a road within the County of Clutha and under the control of such County without first having the cost of reinstating such road estimated by the Clutha County Council and paying the amount of such estimate to such County."

J. A. C. Mackenzie, for the informant.

Walter, for the defendant.

Cur. adv. vult.

DOBBIE, S.M. It is admitted by the defendant that the by-law was duly made, but it is submitted it has now been repealed or abrogated. This particular by-law purports to be made by the Council "in pursuance and in exercise of the powers conferred upon it by the Counties Act, 1920, the Public Works Act, 1928, and in pursuance of all and every other power in that behalf it enabling." Section 108 of the Counties Act, 1920, gives the Council power "to make by-laws for any of the purposes for which the Council is empowered to make by-laws under this or any other Act," and s. 109 provides for the manner of making such by-law and sets out in a schedule the purposes for which by-laws can be made under the Counties Act. None of such purposes applies to the by-law in issue. It is clear, therefore, that the purpose for which the Council is empowered to make the by-law must arise under some other Act." The by-law itself quotes the Public Works Act, 1928. Section 174 of that Act provides that :

"Where the local authority is of opinion that the carriage of any particular weight, or the conduct of any particular kind of traffic has caused or will cause serious injury to a road under its control, the local authority may make a by-law forbidding such carriage or traffic unless the cost, as estimated by the local authority, of reinstating the road is previously paid to it."

"Provided that the provisions of subsection five of section one hundred and fifty-five hereof shall apply to every such by-law."

The first point to be observed is that the by-law in dispute uses almost identical language to that of this section. The by-law uses the words, "unless and until the cost as estimated by the Council of reinstating any road or roads is previously paid to the Council," and the section uses the words, "unless the cost, as estimated by the local authority, of reinstating the road is previously paid to it." Secondly, the by-law applies

"to the carting of timber in loads amounting to heavy traffic" only, whereas s. 174 is general, and applies to the carriage of any particular weight, or the conduct of any particular kind of traffic causing serious injury to a road. The fact that the by-law only deals with portion of the traffic covered by the section is not fatal to it: *Flett v. Bremner* ((1910) 12 G.L.R. 445). From these facts, I think it is clear that the by-law was made by virtue of the power contained in s. 174 of the Public Works Act, 1928. This is important, because s. 174 was repealed by s. 12 (5) of the Transport Law Amendment Act, 1939. That section makes provision as to extraordinary traffic upon county roads and damage caused thereby, but it does not empower local authorities to make by-laws appertaining thereto.

Mr. *Walter* contends that the repeal of s. 174 of the Public Works Act, 1928, abrogated the by-law in question.

Mr. *Mackenzie* contends because s. 175 of the Public Works Act, 1928, was not repealed by s. 12 of the Transport Law Amendment Act, 1939, the Legislature thereby indicated that it did not intend that any by-laws made in pursuance of s. 174 should be abrogated by its repeal. Section 175 is a penal section, and provides that:

"Every person who commits a breach of any such by-law is liable to a fine not exceeding twenty pounds."

I think the reason for not repealing s. 175 along with s. 174 is that it was necessary to retain the penal section in the event of there being prosecutions under the by-law then pending. A prosecution commenced could be completed: s. 20 of the Acts Interpretation Act, 1924.

The law is clear that, when a by-law is made under an Act of Parliament, the repeal of the Act abrogates the by-law unless the by-law is preserved by some provision in the repealing Act: see 8 *Halsbury's Laws of England*, 2nd Ed. 45, para. 78. In *Watson v. Winch* ([1916] 1 K.B. 688), *Sankey, J.*, said: "When a statute is repealed any by-law made thereunder ceases to be operative unless there is a saving clause in the new statute preserving the old by-law. There appear to be two reasons for this: First, because otherwise there might be two inconsistent codes relating to the same matter . . . Secondly, because the usual practice is to insert in the later statute a section expressly preserving made by-laws if it is intended that they shall remain in force" (*ibid.*, 691).

Mr. *Mackenzie* further contends that the by-law in question was made under s. 155 of the Public Works Act, 1928. Subsection 1 of that section defines "heavy traffic," and subs. 2 empowers a local authority to make by-laws concerning such heavy traffic. The clauses of that subsection dealing with damage to roads caused by heavy traffic thereupon are paras. (d), (e), and (f). Paragraph (d) empowers the local authority to make by-laws regulating heavy traffic generally, para. (e) empowers the local authority to make by-laws for the giving and taking security by or from any person that no special damage will accrue to any road by reason of heavy traffic thereon, and para. (f) empowers the local authority to make by-laws providing for the annual or other payment of any reasonable sum by any person concerned in any heavy traffic by way of compensation for any damage likely to occur to any road therefrom. The by-law in question could hardly be made under the power given by para. (d) for the regulation of traffic, nor is the pay-

ment of an estimated amount the giving of security under para. (e), nor is the payment of an annual amount by way of compensation for likely damage under para. (f) the same thing as the payment of an estimated amount for actual damage to be done. It is extremely doubtful if the power under s. 155 is wide enough to empower the Council to make the by-law in question. It does not provide any penalty, whereas s. 155 fixes a fine not exceeding £5 for breach of any by-law made thereunder: para. (n) of subs. 2 of s. 155. For a breach of a by-law made by virtue of the power under s. 174 the penalty, if not provided by the by-law, would be a fine not exceeding £20: s. 175.

In *Mabbott v. Otiranui Timber Co., Ltd.* ((1928) 23 M.C.R. 99) and *Evans v. Sole* ((1936) 32 M.C.R. 7) the prosecutions were under a by-law made in pursuance of s. 174, but such prosecutions were heard before the repeal of s. 174 in 1939. In *Waitotara County Council v. Fordell Timber and Case Co., Ltd.* ((1943) 38 M.C.R. 71), the prosecution was under a by-law made in pursuance of the power under s. 155, and the decision therein is, consequently, not applicable to the present case.

I think it is perfectly clear that the by-law in dispute was made by virtue of the power vested in the local authority under s. 174, and, that section having been repealed, the by-law is abrogated.

The information must, therefore, be dismissed with costs £3 3s. to the defendant.

Information dismissed.

Solicitors for the informant: *Stewart and Mackenzie* (Balclutha).

Solicitor for the defendant: *J. T. Walter* (Balclutha).

[IN THE SUPREME COURT.]

HOPPER v. GEAR MEAT COMPANY, LIMITED.

SUPREME COURT. 1947. November 26. 1948. February 9.
GRESSON, J.

Factories Acts—Offences—Workers employed on Day of Election of Licensing Committee—Such Workers not paid Time and a half after 1 p.m. on that Day—No Right to Additional Pay—“Any half-holiday”—Factories Act, 1921–22, s. 35—Factories Amendment Act, 1936, s. 14 (4)—Factories Act, 1946, ss. 26, 28, 128—Statutes Amendment Act, 1946, s. 26—Licensing Act, 1908, ss. 39, 46.

The day on which the election of a licensing committee takes place under ss. 39 and 46 of the Licensing Act, 1908, is not a half-holiday within the meaning of the term “any half-holiday,” contained originally in s. 14 (4) of the Factories Amendment Act, 1936, and now contained in s. 28 (5) of the Factories Act, 1946.

There was, therefore, no obligation on an employer to pay the employees in his factory in the Lower Hutt Licensing District, who worked on the day on which the election of a Licensing Committee for that district took place, time and a half after 1 p.m. on that day.

APPEAL from the decision of Mr. A. M. Goulding, Stipendiary Magistrate, dismissing two informations against the respondent company alleging that the respondent, being the occupier of a factory within the meaning of the Factories Act, had employed two workers on the day on which the election of a Licensing Committee for the Lower Hutt Licensing District took place and had failed to pay such workers time and a half after 1 p.m. on that day.

The facts as set out in the case on appeal were as follows :—

The Inspector of Factories has laid two informations against the defendant company alleging that the company, being the occupier of a factory within the meaning of the Factories Act, employed two workers, Taylor and Smith, on the day on which the election of a Licensing Committee for the Lower Hutt Licensing District took place, and failed to pay the workers time and a half after 1 p.m. on that day.

The prosecutions raise an interesting question as to the construction of certain statutory provisions in the Factories Act and the Licensing Act which have not previously been the subject of any decision. No heavy penalties are pressed for but, if the contention of the Department is correct, the company will be involved in the payment of upwards of £150 to its workers for the day in question.

March 11 this year was appointed as the day for the election of a Licensing Committee for the Lower Hutt Licensing area, in which area the defendant company's factory is situated. Out of 14,185 electors on the roll entitled to vote at the election, only 239 went to the poll. On that day some 400 employees of the defendant company worked a normal day in the company's works. It is not suggested that all these workers were entitled to vote at the election. No doubt a considerable number of them reside outside the electoral area and have no voting qualification in the Hutt Licensing District. No request was made by any of the workers in the factory, or on their behalf, for a half-holiday, or for time off for those entitled to vote to go and do so. No approach was made to the company by anyone representing the Workers' Union, nor by the Labour Department, warning the company that it had any obligation to allow a half-holiday under the Licensing Act. Some months after the election day, the company was first informed by the District Officer in Charge of the Labour Department that the Department took the view that, in respect of hours after 1 p.m. on March 11, 1947, the company was bound to pay all male employees actually employed at the rate of time and a half for the hours worked. The company takes an opposite view of this matter.

Grieve, for the appellant.

S. G. Stephenson, for the respondent.

Cur. adv. vult.

GRESSON, J. The enactments relating to factories were consolidated by the Factories Act, 1946, which, however (except for some sections not relevant to the question herein), did not come into force until April 1, 1947, so this matter falls to be decided under the Factories Act, 1921-22, which, as originally enacted, provided :—

35. Except as hereinafter provided, the occupier of a factory shall allow to every boy under eighteen years of age and every woman employed in the factory the following holidays, that is to say—

(a) A whole holiday on every Christmas Day, New Year's Day, Good Friday, Easter Monday, Labour Day, and birthday of the reigning Sovereign; provided that when Christmas Day and New Year's Day fall on a Sunday, then the holiday shall be allowed on the next succeeding Monday; and also

(b) A half-holiday on every Saturday from the hour of one of the clock in the afternoon.

Section 36 made provision for a poll of the electors as to whether the weekly half-holiday should be on the same day as the day appointed as the statutory closing-day for shops in the district under the Shops and Offices Act, 1908, and s. 37 contained special provisions relating to newspapers. Section 38 dealt with the question of wages payable for holidays as follows :

(1) Wages for each whole or half holiday shall, in the case of each boy under eighteen years of age or woman, be at the same rate as for ordinary working-days, and shall be paid at the first regular pay-day thereafter.

(2) This section, so far as it relates to the holidays . . . mentioned in section thirty-five hereof, applies to every boy under eighteen years and woman who is paid by time wages, whatever the time, and has been employed in the factory for at least twenty days during the four weeks next preceding the whole holiday, or for at least four days during the week ending on the day on which the half-holiday occurs.

(3) This section, so far as it relates to any other holiday or half-holiday, applies to every boy under eighteen years of age and woman under twenty-one years of age and apprentice who is paid by time wages, whatever the time, and has been employed in the factory for the periods mentioned in the last preceding subsection.

The Factories Amendment Act, 1936 (by s. 13 thereof), amended the above s. 35 by omitting the words "every boy under eighteen years of age and every woman" and substituting the words "every person," thus making it of general application, and as well added Anzac Day and Labour Day to the list of whole holidays. At the same time the above s. 38 was completely repealed and in substitution there was enacted (by s. 14) the following provision :

(1) Wages for each whole holiday allowed to any person as provided in section thirty-five of the principal Act, as amended by the last preceding section, shall be at the same rate as for ordinary working-days, and shall be paid at the first regular pay-day thereafter. 10

(2) Payment of wages for the said holidays shall be made to all persons who have been employed in the factory—

(a) In the case of Christmas Day, Boxing Day, New Year's Day, Good Friday, or Easter Monday, at any time during the fortnight ending on the day on which the holiday occurs : 15

(b) In the case of any other whole holiday, for at least four days during the week ending on the day on which the holiday occurs.

(3) Where any person to whom paragraph (a) of the last preceding subsection applies has been employed by more than one person during the fortnight ending on any holiday referred to in that paragraph, he shall be entitled to receive payment for that holiday from such one or more of those employers, and if more than one in such proportions, as the Inspector determines. 20

(4) Every person who is actually employed on any whole holiday shall, in addition to the payment to which he is entitled under the foregoing provisions of this section, be paid therefor at not less than double the ordinary rate, and every person who is employed on any half-holiday shall be paid therefor at not less than one-half as much again as the ordinary rate : 25

Provided that where the ordinary rate is by time, and not by piecework, the rate payable under this subsection shall not be less than one shilling and sixpence an hour, and shall be paid at the first regular pay-day thereafter : 30

Provided also that where any worker employed in or about a dairy factory or a creamery in which not more than two workers are regularly employed is actually employed on any of the whole holidays specified in section thirty-five of the principal Act (as amended by the last preceding section) he may, in lieu of payment therefor in accordance with this subsection, be allowed two whole holidays at such time or times as the occupier may determine, being not later in any case than one month after the close of the season in which the whole holiday occurred. 35

(5) This section is in substitution for section thirty-eight of the principal Act, and that section is hereby accordingly repealed. 40

In the consolidating Act of 1946, ss. 35 and 38 of the Factories Act, 1921-22, as amended in 1936, are now represented by ss. 26 and 28, which last section in subs. 5 thereof repeats the provision that every person actually employed on any of "the said whole holidays" (the word "said" is introduced) shall be paid therefor at not less than double the ordinary rate, and repeats also the provision which has given rise to this case—namely, that every person actually employed "on any half-holiday" shall be paid therefor at not less than one-half as much again as the ordinary rate. The question is whether the day on which the election of a Licensing Committee for the Lower Hutt Licensing District took place was a half-holiday within the meaning of the words "any half-holiday" as contained originally in s. 14 (4) of the Amendment Act, 1936, and now contained in s. 28 (5) of the Factories Act, 1946. 50

For the Department, it was contended that the words "any half-holiday" are so clear and unambiguous that the half-holiday for which the Licensing Act, 1908, makes provision is such a half-holiday, and the words of that Act are relied upon : 55

Every day on which the licensing poll is taken in any district shall be and be deemed to be a public holiday after midday within each district, and such half-

holiday shall be deemed to be a holiday within the meaning of the several statutes for the time being in force referring to public holidays.

The provisions of section thirty-nine hereof shall extend and apply to the day on which the election of the Licensing Committee takes place.

- 5 The statutory definition of "holiday" contained in the Acts Interpretation Act, 1924, that "holiday" includes "any day declared by any Act to be a "public holiday," was also relied upon.

- For the respondent, it was contended that the statutory definition of "holiday" was subject to the qualification "if not inconsistent with
10 "the context . . . and unless there are words to exclude or restrict "such meaning," and, further, that to interpret "any half-holiday" in the way the Department sought to have it interpreted would produce anomalies amounting to absurdities, and in some cases to injustice.

- The effect of s. 35 of the Factories Act, 1921-22, as amended by the
15 Amendment Act, 1936, is that there shall be "allowed" to every person employed in the factory—

(a) A whole holiday on certain named days.

(b) A half-holiday on every Saturday, unless, pursuant to subsequent provisions, another day of the week should be selected.

- 20 The question of payment was not dealt with by the Legislature until the Amendment Act, 1936, which in s. 14 provides for payment of wages at the ordinary rate for each such whole holiday, and, in addition, payment to every person "actually employed on any whole holiday" at not less than double the ordinary rate, and to every person "employed on any
25 "half-holiday" at not less than half as much again as the ordinary rate.

- It may be noted in passing—and further reference will be made to the fact—that, whereas the opening words of subs. 1 of s. 38 were "Wages
"for each whole or half holiday," subs. 1 of s. 14, by which it was
30 repealed and a new section substituted, drops the allusion to half-holidays and states merely "Wages for each whole holiday."

- The provision for payment for whole holidays is expressly limited to the particular whole holidays on the named days. Section 13 of the Factories Amendment Act, 1936, amended s. 35 of the Factories Act,
35 1921-22, and substituted a new para. (a), which specified certain days. Section 14 (1) directed payment of wages :

for each whole holiday allowed . . . as provided in section thirty-five . . . as amended . . . at the same rate as for ordinary working-days.

- Section 14(2) relates to the length of time persons must have been employed
40 to qualify for "payment of wages for the said holidays," and s. 14 (3) deals with a person employed during the fortnight preceding "that "holiday" by one or more employers. So far, all that had been provided in the way of payment was that persons employed in the factory on whole holidays should receive "payment of wages"—i.e., ordinary pay. All
45 persons employed in the factory within certain limits of time before the holiday were given that. Then s. 14 (4) provided that every person actually employed on any whole holiday should, in addition to the payment to which he was entitled under the foregoing provisions—i.e., ordinary pay—be paid at not less than double the ordinary rate; and provided,
50 further, that every person employed on any half-holiday should be paid therefor at not less than one-half as much again as the ordinary rate. That the additional pay for "any whole holiday" is limited to the specified whole holiday is, in my opinion, clear. If, for instance, the Legislature should have declared the day on which the licensing poll was to be taken a
55 public whole holiday, it would not have been "a whole holiday" within the meaning of s. 14 of the Factories Amendment Act, 1936. It is an

inviting interpretation that the term "any half-holiday" should in consonance be similarly limited—*i.e.*, as referring to the weekly half-holiday, whether taken on Saturday or on any other day. But there are considerable difficulties in the way of so holding. Though s. 35 of the Factories Act, 1921-22, recognized only two types of holidays and half-holidays—namely, (a) whole holidays on the days specified, and (b) the weekly half-holiday (either on Saturday or on some other day), s. 38 of that Act was wider, recognizing not only these two types ("the holidays and half-holidays mentioned in section thirty-five"), but also "any other holiday or half-holiday." The Amendment Act, 1936, besides removing the limitation to boys and women and adding certain other named days as holidays to be allowed (s. 13), provided payment of wages "for each whole holiday" allowed to any person as provided in s. 35 of the principal Act at the ordinary rate, and, subject to certain qualifications, additional payment at not less than double the ordinary rate for "every person . . . actually employed on any whole holiday"; it then provided further that "every person . . . employed on any half-holiday" should be paid at not less than one-half as much again as the ordinary rate. There is a final declaration that the section is "in substitution for section thirty-eight of the principal Act," and that section was accordingly repealed.

In 1938, by the Statutes Amendment Act, 1938, s. 17, subs. 2 of s. 14 of the Amendment Act, 1936, was expressed more simply :

(2) Payment of wages for the said holidays shall be made to all persons who have been employed in the factory at any time during the fortnight ending on the day on which the holiday occurs.

And subs. 3 was re-enacted in a slightly different form :

(3) Where any person has been employed in a factory by more than one person during the fortnight ending on the day on which any of those holidays occurs he shall be entitled to receive payment for the holiday from such one or more of those employers, and if more than one in such proportions as the Inspector determines. The words "said holidays" and "those holidays" exclude half-holidays.

Later that year, it was decided in *A. and T. Burt, Ltd. v. Blair*(1) that, when any one of the holidays specified in s. 35 of the Factories Act, 1921-22, as amended by the Amendment Act, 1936, fell on a non-working day, a holiday could not be "allowed," and that, therefore, persons employed in the factory were not entitled to wages for that day.

In 1941, by s. 25 of the Statutes Amendment Act, 1941, s. 14 (2) of the Factories Amendment Act, 1936, in the form in which it had been recast by s. 17 of the Statutes Amendment Act, 1938, set out above, was repealed, and for it was substituted :

Where any person has been employed in a factory by any employer at any time during the fortnight ending on the day on which any of the whole holidays referred to in paragraph (a) of section thirty-five of the principal Act as set out in the last preceding section occurs, he shall be entitled, subject to the next succeeding subsection, to receive payment for the holiday from that employer.

Again, the enactment is limited to the whole holidays.

Then, in 1946, came a consolidating statute—the Factories Act, 1946—which, in s. 28, reproduced s.15 of the Factories Amendment Act, 1936, with the incorporation of the amendments of 1938 and 1941. Though the terms of the section are substantially the same, there are changes of language which emphasize the limited meaning to be given to the words "any whole holiday," but which do not elucidate the indefinite phrase "any half-holiday." Subsection 5 of s. 28 substituted for "any

(1) [1938] N.Z.L.R. 968.

"whole holiday" the words "any of the said whole holidays," but left the words "any half-holiday" without modification of any sort, notwithstanding that the word "actually" was interpolated before "employed" to conform to the words "actually employed" earlier used in reference to the whole holidays. It is a reasonable inference that such wide language continued in relation to the half-holiday, and in striking contrast to the express limitation always attaching to the whole holidays, is deliberate. But that is not all. When the Factories Amendment Act, 1936, repealed s. 38 of the Factories Act, 1921-22, and substituted s. 14 of the Amendment Act, 1936, the provision of payment at ordinary rates for half-holidays (which was at that time limited to boys and women) was omitted. Whereas the earlier Act had provided for payment "for each whole or half holiday . . . at the same rate as for ordinary working-days," the Amendment Act, 1936, and the subsequent amendments have nothing to say about payment for half-holidays except in the one subs. 5 which in these proceedings has to be interpreted. It is difficult to understand why no provision is made for half-holidays, and subs. 4 of s. 14 of the Amendment Act, 1936, considered against this background, is difficult to construe. The earlier part is plain:

Every person who is actually employed on any whole holiday shall, in addition to the payment to which he is entitled under the foregoing provisions of this section, be paid therefor at not less than double the ordinary rate.

But what follows is obscure:

and every person who is employed on any half-holiday shall be paid therefor at not less than one-half as much again as the ordinary rate.

Is this latter payment an "additional" payment, as is stated in regard to the whole holidays, and, if so, additional to what? Or is there to be quite different treatment for workers on half-holidays? Finally—the crucial question in the case—to what is the Legislature referring when it says "any half-holiday"?

It is permissible to turn to the subsequent consolidating Act, 1946, in search of some light upon the question. Though normally subsequent legislation is not very relevant in the construction of a statute, in the circumstances of this case, and having regard to the subject-matter, it is proper to look to the consolidating Act, 1946, as furnishing a legislative interpretation of the earlier Acts: *Clarke v. Powell*(2) and *Smith v. Lindo*(3). Sections 19 to 36, inclusive, of the consolidating Act, 1946, deal comprehensively with the topic "Working-hours, Holidays, and Wages." Some of the provisions are that: No woman or boy shall be employed during night hours as stated, nor on Sundays nor "on any holiday or half-holiday." No boy or girl shall be employed, even under extended working-hours, "on any holiday, half-holiday, or Sunday." Section 26 (a) names the whole holidays to be allowed and (b) directs "a half-holiday on every Saturday," with a further subsection that it shall be lawful to employ any male worker "on any whole holiday or half-holiday aforesaid." Section 27 provides for a poll as to the weekly half-holiday, and then follows s. 28, substantially reproducing (in subs. 5) subs. 4 of the Amendment Act, 1936, the construction of which is obscure. Section 29 deals with the wages to be paid for Sunday work. Section 30 contains special provisions in respect of dairy factories. Section 31 authorizes modification of the three preceding sections by Order in Council. Section 32 relates to newspapers, and permits any person

(2) (1833) 4 B. & Ad. 846; 110 E.R. 674. (3) (1858) 4 C.B. N.S. 395; 140 E.R. 1138; aff. on app. (1858) 5 C.B. N.S. 587; 141 E.R. 287.

to be employed in the printing, publishing, or delivery of a newspaper "on the half-holiday." Section 33 makes it lawful in a milk-preserving factory to employ women during certain portions of the year "on any whole holiday or half-holiday." The section provides: If so employed "on any whole holiday," she shall within twenty-eight days thereafter be allowed a whole holiday on a working-day in lieu thereof; if so employed "on any half-holiday," she shall within six days be allowed a half-holiday on some working-day. Finally, in subs. 4:

Any woman employed as aforesaid on any whole holiday, or on any half-holiday, shall be paid therefor at not less than half as much again as the ordinary rate.

Finally, ss. 34, 35, and 36 all deal with "Payment of Wages," but nowhere therein is there any allusion either to whole holidays or to half-holidays.

It appears, therefore, that, reviewing the legislation as a whole, there was at one time reference to whole holidays on named days, the weekly half-holiday, and "any other holiday or half-holiday" (Factories Act, 1921-22, s. 38); that, upon the repeal of this section, the subsequent legislation referred only to the two former types, was very precise in regard to "the said whole holidays," and enacted a good deal in regard to these separately. There are no specific references to a half-holiday except in the vague phrase "any half-holiday" in the subsection under consideration, the more definite phrases, "the weekly half-holiday" and "the half-holiday under this Act," in the section relating to a poll to determine on which day of the week it shall be held, the equally definite phrase "the half-holiday" in the section relating to newspapers, and the coupling together of "any whole holiday or half-holiday" without any distinctions in subs. 2 of s. 26 of the consolidating Act, 1946 (permitting work thereon), and in s. 33 of that Act (in relation to employment of women in milk-preserving factories).

Reference may also be made to the Industrial Conciliation and Arbitration Amendment Act, 1936, passed on the same day as the Factories Amendment Act, 1936, which directed that, wherever it was practicable, awards should fix working-hours at not more than forty hours a week, and that:

the Court shall endeavour to fix the daily working-hours so that no part of the working period falls on a Saturday.

It follows that the intention of the Legislature was that, so far as practicable, Saturday should be, not a half-holiday, but a non-working day.

From this exhaustive examination of legislation which may be said to be related to the question herein, nothing emerges to warrant interpreting "any half-holiday" as "the half-holiday" decreed by s. 35 of the Factories Act, 1921-22, except that the vague expression "any half-holiday" may have been thought appropriate rather than a more specific reference, because work on Saturday, which was the normal half-holiday, was soon, so far as possible, to be eliminated, and there would not be many cases where there was a weekly half-holiday. This speculation—for it can be little more—would be unsafe ground upon which to base an interpretation of the section. But, in a desperate search for some guidance upon legislation perplexing in its obscurity, it is justifiable to consider the provisions of the Electoral Act, 1927, in relation to factory employees and voting. That Act in s. 128 provided that "every day on which any election takes place shall be and be deemed to be a public holiday after midday," but provided as well that, for the purpose of the Shops and Offices Act, 1921-22, when the polling-day was fixed for a day other than the weekly half-holiday, it should not be necessary to keep the ordinary weekly half-holiday if expressly provided;

also, that it should not be necessary for any factory to close during any working-hours on the polling-day, but that the occupier of the factory should afford to each of his employees a reasonable opportunity of recording his vote without any deduction of wages, provided the time so occupied did not exceed one working-hour. By the Statutes Amendment Act, 1946, fresh subsections were enacted, to the effect generally that all factories, shops, offices, and business premises in which any workers were employed should be closed not later than two o'clock in the afternoon without any deduction of wages, but it was the former provision that was in force when the Factories Amendment Act, 1936, was passed, and it may be invoked as "a contemporaneous exposition of the Legislature itself."

It is difficult to believe that the Legislature, when in 1936 it enacted that "every person who is employed on any half-holiday shall be paid therefor at not less than one-half as much again as the ordinary rate," meant this to apply to the half-holiday declared by the Licensing Act, in view of the fact that legislation then current expressly provided that factories need not close even on the day of the General Election, but should merely allow their employees time off to vote. The provisions were, of course, in respect of the election of members of the House of Representatives, whereas the section of the Licensing Act invoked by the Department in this case relates to the licensing poll, and to the election of the Licensing Committee, but the qualification of electors is the same in each case; and the General Election is unquestionably the more important.

To give to the words "any half-holiday" their primary and literal meaning produces an effect inconsistent with other provisions of the Legislature, and bordering on the absurd. I think the phrase is not to be construed as if the section stood alone, but must be "restrained with the fitness of the matter." Whatever the term "any half-holiday" in subs. 4 of s. 14 of the Factories Amendment Act, 1936, may mean, I am of opinion that it does not include the half-holiday decreed by the Licensing Act, 1908, ss. 39 and 46. Having regard to the fact that the language is general, doubtful, and obscure, I am warranted in adopting an interpretation to avoid repugnance, absurdity, or injustice, and I hold, accordingly, that there was not an obligation to pay the employees who worked on that day half as much again as the ordinary rate, and that the learned Magistrate was right in refusing to convict.

The appeal is dismissed accordingly, with costs £10 10s. to respondent.

Appeal dismissed.

Solicitor for the appellant: *Labour Department Solicitor* (Wellington).

Solicitors for the respondent: *Stephenson and Anyon* (Wellington).

[IN THE MAGISTRATES' COURT.]

HAZLEDON *v.* BARRINGTON; SAME *v.* BIRCHFIELD;
SAME *v.* McARA.

1948. February 5, 19, March 3, before Mr. A. M. GOULDING, S.M., at Wellington.

Municipal Corporation—By-law—Meetings—By-law providing No Meeting to be held in (inter alia) Any Public Reserve “except with the prior written authority of the Town Clerk”—Ultra Vires—Unreasonable—“Regulating the use of reserves”—“In any particular case”—Municipal Corporations Act, 1933, s. 364 (18), 367 (b)—By-laws Act, 1910, s. 13.

Clause 62 (as amended) of Part 1 of the Wellington City By-laws (dealing with streets and public places) made it an offence on the part of any one who :

“(a) Organizes, holds, or conducts or attempts to hold or conduct any public meeting, gathering or demonstration or makes any public address or attempts to collect a crowd in along or upon any street, private street, public place or public reserve in the City “except with the prior written authority of the Town Clerk.”

On a prosecution charging each of three defendants with the offence of conducting meetings in Dixon Street Reserve, vested in the Wellington City Corporation, without prior written authority of the Town Clerk,

Held, 1. That the by-law in question is *ultra vires* the City Corporation in that a delegation to the Town Clerk of the power to grant permits for public meetings, &c., on all streets, public places, and reserves, is so wide and general that it ceases to be a delegation of something to be done “in any particular case” within the meaning of those words in s. 13 (1) of the By-laws Act, 1910, and becomes a complete delegation to the Town Clerk of all power.

Staples and Co., Ltd. v. Mayor, &c., of Wellington ((1900) 18 N.Z.L.R. 857), *Bremner v. Ruddenklau* ([1919] N.Z.L.R. 444), and *Munt, Cottrell, and Co., Ltd. v. Doyle* ((1904) 24 N.Z.L.R. 417) followed.

Stanley v. Scott ([1935] N.Z.L.R. s. 15) distinguished.

2. That, for the same reasons, the by-law is “unreasonable” within the meaning of that term as used in s. 13 (2) of the By-laws Act, 1910.

Semble, That the by-law in question is unreasonable, and might well be a source of oppression, in view of the common-law right of freedom of speech and opinion at public meetings and gatherings, in leaving the right to grant permits under it to the unfettered discretion of the Town Clerk.

Kruse v. Johnson ([1898] 2 Q.B. 91), *Grater v. Montagu* ((1904) 23 N.Z.L.R. 904), *McCarthy v. Madden* ((1914) 33 N.Z.L.R. 1251) and *Hanna v. Auckland City Corporation* ([1945] N.Z.L.R. 622) applied.

INFORMATION by an Inspector for the Wellington City Council against each of the three defendants for conducting meetings on the Dixon Street Reserve without the prior written authority of the Town Clerk. The informations against Barrington and McAra related to the evenings of October 31 and November 7, 1947, and those against Mrs. Birchfield related to the evening of October 31, 1947, and lunch-hour on Thursday, November 6,

The facts which emerged from the evidence, so far as they related to the charges, were as follows.

Dixon Street Reserve was a public reserve vested in the Wellington City Corporation. On the various occasions alleged, the respective defendants did address public meetings at the Reserve. Such meetings were quite orderly, and from sixty to one hundred persons were present on each occasion. None of the defendants had permits from the Town Clerk in respect of the meetings held on October 31 and November 7, but Mrs. Birchfield claimed that she had a permit for Thursday, November 6.

Mr. Barrington was president of a body called the Christian Pacifist Society. In February, 1947, he made application to the City Director of Parks and Reserves for permission for his society to hold open-air meetings on Friday evenings, either at (a) Dixon Street Reserve, or (b) the corner of Allen Street and Courtenay Place, or (c) Swan Lane. The Director of Parks and Reserves replied saying the application was not approved by either the Reserves Committee or the By-laws Committee. No reason was given for the non-approval. Thereupon Mr. Barrington wrote asking why a permit for all three sites was refused and whether the refusal was general or applied only to the three sites.

The Town Clerk replied on March 31, 1947, stating :

"The By-laws Committee of the Council is of opinion that these meetings should not be held on Friday evenings as the City streets are already overcrowded with pedestrians and vehicular traffic."

Mr. Barrington later decided to hold meetings without a permit, and over a period from August to December, 1947, he repeatedly addressed public meetings at Dixon Street Reserve on Friday evenings. There was no evidence that any complaints of any kind were made to the City authorities concerning any of those meetings. The learned Magistrate accepted that fact, plus Mr. Barrington's own evidence, as showing that the meetings were in no way disorderly or a cause of annoyance or disturbance to anyone.

Defendants Mrs. Birchfield and Mr. McAra were members of the Communist Party. They also held public meetings as alleged in the informations at Dixon Street Reserve. Admittedly, they had no permit for the meetings on October 31 and November 7 (Friday evening), but Mrs. Birchfield, for the meeting on Thursday November 6 (lunch-hour), placed reliance upon a permit dated November 4, 1946, under the hand of the Director of Parks and Reserves, given to the Communist Party to the following effect :—

"Permission is hereby granted for you to use the Dixon Street Reserve on Thursdays between 12 noon and 2 p.m."
The learned Magistrate said that he doubted if this was a valid permit

within the by-law, but, in view of the decision he had reached on other grounds, it was unnecessary to determine the point.

It appeared from the evidence that both Mrs. Birchfield and Mr. McAra were candidates for election to the Wellington City Council in the municipal elections in November, 1947, and their meetings in October and November at Dixon Street Reserve were in furtherance of their candidature. Permits were given to the Labour Party to make use of Dixon Street Reserve for election meetings, but the evidence was not clear whether these permits covered Friday evenings.

F. H. Jones, for the informant.

N. R. Taylor, for the defendant Birchfield.

The defendants Barrington and McAra appeared in person.

Cur. adv. vult.

GOULDING, S.M. [After finding the facts, as above:] In the past, public meetings have been convened and addressed by members of the Communist Party at Dixon Street Reserve on a variety of occasions. Instances of such meetings occurred during the General Election in 1943, during municipal elections in 1944, during the Allied Nations week and the Victory Loan Campaign (covering approximately one hundred separate gatherings.)

There is no evidence to show that any complaints whatever reached the municipal authorities concerning any meeting held by either Mrs. Birchfield or Mr. McAra.

With regard to traffic problems, the evidence of the Inspector called before me concerning difficulties on Friday evenings in the vicinity of Dixon Street Reserve is of such a general character that it is impossible to believe that any serious traffic difficulties were created by any of the meetings in respect of which the informations are laid. The speakers at the meetings spoke on the Reserve itself, and those who were interested were gathered mostly on the Reserve, and not on the street. If traffic difficulties are a real and substantial ground for refusing permits for public meetings at Dixon Street Reserve on Friday evenings, one would expect the prohibition to apply to everyone throughout the year, and the evidence justifying prohibition on that ground would require to be much stronger than anything placed before me in the present cases. It may well be that there is justification for forbidding such meetings; and that evidence showing serious traffic difficulties, if such meetings are allowed, can be put before the Court.

The defendants allege that the Council has shown unfair discrimination against them in refusing permits to speak at Dixon Street Reserve, in that it does not refuse permission to everybody to hold meetings at the Dixon Street Reserve, and that permission is granted to a variety of people to conduct meetings in or near that locality. I am not prepared, upon the evidence before me, to hold that there is any unfair discrimination shown by the Council. If that could be established, I have no doubt that other steps could be taken to compel the Council to grant permits to the defendants.

The substantial defence to these prosecutions is that the by-laws under which they are laid are invalid for a variety of reasons.

Part 1 of the Wellington City By-laws, 1933 (dealing with streets and public places), Clause 62, as amended by Amendment No. 22 of 1940, makes it an offence for anyone who :

“Organizes, holds, or conducts or attempts to hold or conduct
“any public meeting, gathering or demonstration or makes any public
“address or attempts to collect a crowd in along or upon any street,
“private street, public place or public reserve in the City except
“with the prior written authority of the Town Clerk.”

Counsel for the defendant Mrs. Birchfield (the other defendants were not represented by counsel) contends that the by-law is invalid for want of form, uncertain and indefinite in its terms, unreasonable and unequal in its operation, and *ultra vires*. For the City Council, the case of *Stanley v. Scott* ([1935] N.Z.L.R. s. 15) is relied upon as an answer to the above contentions.

The powers of the Council with regard to making by-laws affecting reserves are to be found in s. 364 (18) of the Municipal Corporations Act, 1933, which section gives power to make by-laws “regulating the
“use of any reserve . . . vested in the Corporation or under the control of the Council.”

Section 369 of the Municipal Corporations Act lays down the manner in which by-laws are to be made. It may be assumed that, in the making of the particular by-laws now under consideration, those provisions have been observed. But the objection to the by-law is that it purports to leave to the Town Clerk the very important duty of issuing or giving written permits for the conduct not only of public meetings but of other public gatherings or demonstrations, or of anything in the nature of a public address or the collection of a crowd in streets or reserves or public places. It appears to me that this by-law, in so delegating that wide authority to the Town Clerk, transgresses the law. If it is left to the Town Clerk to determine in each and every case whether permits shall or shall not issue, then the law becomes that of the Town Clerk and not of the Council, which is what a good by-law should be, subject to certain restricted powers of delegation: see, on this subject, *Staples and Co., Ltd. v. Mayor, &c., of Wellington* ((1900) 18 N.Z.L.R. 857). Speaking of the by-law under discussion in that case, *Stout, C.J.*, said: “It leaves to the ordinary meetings of the Council the power to legislate on each particular building
“as the application for a building-license comes in. No one intending
“to build can know what the decision—what the law of the Council
“may be. It may vary every fortnight, or as frequently as the Council
“may meet. At one meeting it might prevent brick being used, and
“next fortnight allow brick, and so on. And there is no need of attacking
“the honesty of the Councillors, though this variation is seen in their
“procedure. It may all depend on who are present, and on the views of
“the Councillors. I do not think that a by-law that will permit such
“a variation in procedure can properly be called a law” (*ibid.*, 862, 863). And again: “The by-law would allow legislation by the City
“Council for individual cases, and without any safeguard such as the
“statute prescribes” (*ibid.*, 863).

I do not overlook that by s. 367 (b) of the Municipal Corporations Act, 1933 :

"A by-law may leave any matter or thing to be determined, applied, dispensed with, prohibited, or regulated by the Council from time to time by resolution, either generally or for any classes of cases, or in any particular case."

While that provision was introduced to meet the decision in *Staples and Co.'s* case, the power conferred by it is still a power to be exercised "by the Council from time to time by resolution": see *Munt, Cottrell, and Co., Ltd. v. Doyle* ((1904) 24 N.Z.L.R. 417).

It is in this respect that I think the Auckland case of *Stanley v. Scott* ([1934] N.Z.L.R. s. 15) does not meet the contention set up by the defendants. In that case, the appellant, who was the defendant in the Court below, sought to test the validity of the Auckland City By-law by conducting a public meeting in a public place without a permit. The Auckland by-law, a copy of which has been placed before me, is to the following effect:—

"365A. Every person shall be guilty of an offence against this by-law who holds, organizes or directs any procession, whether vehicular or pedestrian or partly vehicular and partly pedestrian or of any other type whatsoever, or any public meeting, gathering or demonstration in along or upon any street, private street or public place otherwise than pursuant to the authority of and in conformity with the terms of a written permit previously issued by the Council or by such Committee, member or officer of the Council as the Council may from time to time direct, and every person who takes part in any procession, meeting gathering or demonstration forbidden by this by-law shall also be guilty of an offence."

Now, that by-law is very different from the one now under consideration. It is obvious upon the reading of it that no permit can be given for a meeting:

"otherwise than pursuant to the authority of and in conformity with the terms of a written permit previously issued by the Council or by such Committee, member or officer of the Council as the Council may from time to time direct."

In giving judgment in that case, *Stanley v. Scott* ([1935] N.Z.L.R. s. 15), *Reed, J.*, says: "The by-law in question does not set out definite terms and conditions upon which meetings may be held, but requires permission to be obtained before holding a meeting, and it is claimed that this fact renders the by-law indefinite and uncertain in its terms and therefore invalid. But this point is met by s. 13 of the By-laws Act, 1910, which provides: 'No by-law shall be invalid because it requires anything to be . . . approved in any particular case by the local body making the by-law, or by any officer or servant of the local authority, or by any other person, or because the by-law leaves any matter or thing to be determined . . . in any particular case by the local authority . . . or by any other person.' This, in my opinion, authorizes the condition that permission must be obtained before a public meeting is held. Attention, however, is drawn to subs. 2 of that section, which provides that the section shall not apply to any case in which the discretion so left by the by-law

" . . . is so great as to be unreasonable. It is contended that the discretion left in the present case is unreasonable. I am unable to accept that contention. It must be assumed that the City Council will act reasonably and will give due consideration to every application for permission to hold a meeting, and that permission will be granted except in cases where the general interests of the public otherwise require " (*ibid.*, s. 16).

It is clear from the last passage of the quotation that the learned Judge took the view that the Council would itself consider applications for permits. The Wellington by-law makes no suggestion that the Council will consider any particular application. Everything under this by-law is left to the Town Clerk.

Nor do I think that s. 13 of the By-laws Act, 1910, meets the contention set up for the defence.

The delegation of the by-law-making authority which may be made under that section was the subject of much discussion by the Full Court in *Bremner v. Ruddenklau* ([1919] N.Z.L.R. 444). Particularly discussions centred around the meaning of the phrase "in any particular case" which occurs in subs. 1 and the question as to whether delegation authorized by that subsection was reasonable within subs. 2. *Stout, C.J.*, considered that the section enabled a local body to enact a by-law which would be valid even though it delegated authority to a specified servant or officer of the local body to direct how some matter or thing within the by-law should be done or directed or ordered. He says: "The by-law itself although it does not dictate the law to be obeyed by the citizens, but leaves their conduct to that which X [the local authority], Y [any officer or servant], or Z [any other person] may require to be performed, is not thereby invalid. This part of the section, therefore, contemplated a by-law delegating legislative powers of X, Y, or Z " (*ibid.*, 453).

The learned Chief Justice then went on to discuss the legislative powers which could be lawfully delegated "in any particular case" (*ibid.*, 454), and *Hosking, J.*, discussed the same phrase (*ibid.*, 469, 470).

[After citing from the judgment of *Chapman, J.* on the question of "reasonableness" of the delegation within s. 13 (2) (*ibid.*, 460, 461), and of *Hosking, J.* (*ibid.*, 471), the learned Magistrate continued:] Applying the reasoning of the learned Judges abovequoted to the by-law now under consideration, I have reached the conclusion:—

(a) That a delegation of the power to grant permits for public meetings, &c., on all streets, public places, and reserves to the Town Clerk is so wide and general that it ceases to be a delegation of something to be done "in any particular case" within s. 13 of the By-laws Act, 1910, and becomes a complete delegation to the Town Clerk of all power.

(b) That for the same reasons it is unreasonable within subs. 2 of s. 13.

That being the case, I think the by-law is invalid and the informations must be dismissed.

I need not, therefore, discuss at any length the other contentions raised by counsel for Mrs. Birchfield, except to say this. Whatever a person's race or creed or nationality, the common-law right of freedom of speech and opinion at public meetings and gatherings is a treasured

right not to be denied lightly. While the right cannot, in my view, be exercised in public streets or reserves entirely without control or regulation, particularly in a modern city, the by-law under consideration is unreasonable and might well be a source of oppression, particularly in leaving, as it does, the right to grant permits under it to the unfettered discretion of the Town Clerk.

I think this view is borne out by the case quoted before me of *Kruse v. Johnson* ([1898] 2 Q.B. 91) and the New Zealand cases, *Grater v. Montagu* ((1904) 23 N.Z.L.R. 904), *McCarthy v. Madden* ((1914) 33 N.Z.L.R. 1251), and *Hanna v. Auckland City Corporation* ([1945] N.Z.L.R. 622).

Informations dismissed.

Solicitor for the informant: *City Solicitor* (Wellington).

Solicitors for the defendant Birchfield: *Duncan, Mathews, and Taylor* (Wellington).

JEPSEN v. HUTT COUNTY

1947. November 3, 13, December 5, before Mr. A. M. GOULDING, S.M., at Wellington.

Counties—Misfeasance—Culverts under Road—Water from Broken Culvert damaging Adjoining Property—Culverts blocked by County Workmen in building and repairing Road—Misfeasance or Nonfeasance—Public Works Act, 1928, ss. 2, 110, 260, 261.

Culverts or drains under a road are portion of the road within the definition of "road" in s. 110 of the Public Works Act, 1928; and the word "drain," as defined by s. 260 of that Act, is wide enough to include culverts running under the road.

No statutory obligation under s. 261 of the Public Works Act, 1928, is cast upon a County to keep in repair drains running under its roads.

McGregor v. Wanganui County Council ((1898) 17 N.Z.L.R. 422) followed.

Where a local body actively does something with regard to a road or a drain within its control and thereby creates any danger which results in damage, the person injuriously affected may recover. If it does nothing with regard to roads or drains, which may get completely out of repair, it will not be liable; once, however, it does anything to repair them, it must do its work properly and without negligence.

McClelland v. Manchester Corporation ([1912] 1 K.B. 118) followed.

Essendon Corporation v. McSweeney ((1914) 17 C.L.R. 524), *Bathurst Borough v. Macpherson* ((1879) 4 App. Cas. 256), *Fortescue v. Te Awamutu Borough* ([1920] N.Z.L.R. 281), and *Ham v. Blenheim Corporation* ([1921] N.Z.L.R. 358) applied.

Observations on the distinction to be drawn between misfeasance and nonfeasance.

ACTION in which the plaintiff claimed damages against the County founded on allegations of misfeasance or neglect by the County connected with certain culverts running under a road opposite plaintiff's property, as a result of which the plaintiff's property was badly damaged in a severe storm in February, 1947.

On February 14 and 15, following a somewhat long spell of dry weather, a southerly storm blew up accompanied by very heavy rain. The meteorological records at Kelburn show a rainfall of 4.05 in. between 9 a.m. on February 14 and 9.40 a.m. on February 15, and a further rainfall of approximately 2 in. between 9 a.m. and 3 p.m. on February 15. An almost equally heavy rainfall was recorded at Kaitoke. On the Saturday morning, the plaintiff discovered that a large slip had come down on his property, just below the point at which a 9-in. pipe culvert ran under the road. When he saw the slip first, this particular culvert was discharging water full bore, and it was pouring over the face of the slip in a waterfall from 10 ft. to 15 ft. in height. The actual edge of the slip over which it was pouring was some 15 ft. to 20 ft. beyond the outlet of the culvert.

An inspection of four other culverts on the road near to the one mentioned above, but higher up the road, showed that none of such culverts was working efficiently, and one or two were not working at all. This caused a very much greater amount of water to be discharged through the culvert where the slip occurred. It was alleged that the Council, by certain acts of neglect and misfeasance, caused the blockage of some of these culverts, and that, had they been working efficiently, plaintiff would not have suffered damage.

G. H. A. Swan, for the plaintiff.

T. C. A. Hislop, for the defendants.

Cur. adv. vult.

GOULDING, S.M. Upon the evidence, I find the following facts:

The original road fronting plaintiff's property was formed before the road came under the County control.

Certain culverts were made under the original road. From the field-book of a surveyor, Sircombe, about 1874, only one of the five culverts which came under particular question in this action is shown. That is the one numbered 5 on the plan before the Court.

From time to time since the County took control of the road other culverts have been put in, and, upon the evidence, I am satisfied that these were put in by the County Council. Over the years, alterations to the road, widening, straightening bends, improving grades, &c., have been carried out by the Council.

In two respects in particular the evidence satisfies me that the acts of the Council or its employees resulted in:

(a) A complete blocking of what was called culvert No. 2 on the plan before the Court. This followed upon a somewhat similar slip on the plaintiff's land (then owned by a predecessor in title, Smith) at the outfall of culvert No. 2. I accept the evidence of Mr. Todd, the gardener, who has been working for successive owners of this property for thirty-four years, as to what occurred after that slip. He says the roadway was partly collapsed, that the County Council men, in building it up and repairing it, actually blocked up the drain at its intake, and, in building up the road,

the entrance to the pipe, instead of being at the roadside, was 3 ft. in under the roadway itself when finished. This evidence is confirmed by the evidence of both plaintiff and Todd, who had difficulty in locating this culvert after the February storm. Todd recalled the former slip, and said that a culvert should be there. When they did locate the outlet of the culvert, that was clear, but they had difficulty in finding the intake. It was 3 ft. in under the roadway, and completely blocked with stones.

(b) The road at No. 5 culvert had been widened at some time, and the result was that the outlet of this culvert had been covered up. After the February storm, it was found 2 ft. in from the outer edge of the roadway.

For a long time before February, 1947, probably three or four years, a large gorse-bush had been allowed to grow on the roadside close to the intake of culvert No. 4 (again a 9-in. pipe culvert). A branch of this gorse-bush, growing horizontally across the mouth of this pipe, had been sucked into it, and that plus an accumulation of stick, leaves, dirt, and other debris had completely blocked this culvert during the storm. Since the storm, this gorse-bush has been recently cut down and removed, but there is no evidence to show by whom. It was not removed by the plaintiff.

Number 3 culvert, immediately after the storm, was not by any means clear, and appeared to be partially blocked about the middle of the pipe under the road. There is nothing to show that the blocking or choking of this culvert is in any way attributable to acts either of commission or omission on the part of the Council.

A little time before the storm in February, plaintiff had dug about a dozen post-holes in the piece of land on which the slip occurred. In some of these concrete posts had been put and rammed home, but with regard to three or four of them the holes were still open. On the evidence, however, there is nothing satisfactory to show that the digging of these post-holes contributed to the slip. Nor does the evidence satisfy me that the clearing of undergrowth by the plaintiff on his own land contributed to the slip which did him damage.

The blocking of culvert No. 2 by the Council's employees many years ago, the blocking of the exit to No. 5 culvert by road-widening, which covered the outlet of the pipes, and the failure of the Council employees to clear the gorse-bush by the intake of No. 4 culvert, were all factors contributing to the throwing on No. 1 culvert the burden of carrying practically the whole of the stormwater pouring from the watershed which should have been served and drained by five culverts, each 9 in. in diameter. This was the real cause of the slip which did the damage complained of. The report from the Department of Industrial Research and the evidence of the engineer of the Council lead to the conclusion that, in country of the nature where this slip occurred, the concentration of a stream of water in the volume which poured from culvert No. 1 on this occasion is fraught with danger of slips, and that is what occurred on this occasion.

Without traversing the evidence in detail, I am satisfied that, had all the culverts been clear and working properly, they would have carried off, without running to full capacity, not only the rainfall which occurred in February, but a much greater rainfall. Mr. Gander's evidence, I think, establishes this, and it also establishes that Nos. 1 and 2 culverts

would normally drain an area of 2 acres or a little more, and that culverts Nos. 3, 4 and 5 would drain an area of about 4 acres. From his evidence, too, it is clear that nothing short of a cloudburst and rainfall far in excess of what fell in February would cause No. 1 culvert to discharge full bore, even if it had to receive all the water coming from the step ground which would be drained by Nos. 1 and 2 culverts. This is borne out by the evidence of the County Engineer on this matter.

Mr. Campbell, overseer for the County suggested in his evidence that, had the culverts not all been working, the water would have flowed across the road, and that one culvert only could not have carried it all. There is no evidence, however, that the water did pour across the road and there is very clear evidence that No. 1 culvert ran to full capacity and that the other culverts were blocked.

I think, then, the answer to the claim before the Court is to be found in the answer to the question: Was the County Council guilty of an act of misfeasance, not merely non-feasance, with regard to these drains or culverts running under the road abutting the plaintiff's property? If it was, and if the result of such act or acts of misfeasance is damage to the plaintiff, then the Council is liable. I have, since the action came to trial, examined the Public Works Acts and the Counties Act referred to by counsel. I am satisfied that the road is within the control of the County Council: see s. 155 (2) of the Counties Act. I am also satisfied that the culverts or drains referred to are portion of the "road" within the definition given to that term by s. 110 of the Public Works Act.

While the word "culvert" is not specially defined in the Public Works Act, s. 260 defines the word "drain," and that definition is certainly wide enough to include the culverts running under this road. They are really pipe-drains. By subs. (2) of that section:

"Any such drain made . . . under any road . . . vested in the Crown . . . is a public drain within the meaning of "this Act."

Utmost reliance is placed by Mr. Hislop on *McGregor v. Wanganui County Council* ((1897) 17 N.Z.L.R. 422), as establishing that the definition of the word "drains" in the Public Works Act does not cover such drains as a local body puts under roads for road-drainage purposes. The passage relied on is where *Prendergast, C.J.*, says: "I do not think that the Public Works Acts in the provision relating to drainage were intended to give or do give to the owner of private lands a right to have maintained in good order as part of the drainage of a district every drain and culvert which has been constructed as and for the protection of the road; it seems to me that the provisions referred to only apply to drains constructed for the drainage of land—such drains as could properly be considered part of such a scheme as might be included in the drainage-map. It is, I confess, difficult to put this limitation on the very general terms used, but I think it could not have been intended to make every road-drain and culvert a public drain, with a right to have the same maintained for the purpose of draining the lands capable of making use of them" (*ibid.*, 426). And *Pennefather, J.*, when delivering the judgment of the Court of Appeal, said: "We are also of opinion that the provisions of the Public Works Act have no application, as the drains there referred to are drains constructed for the drainage of land; the word does not include culverts placed under a road for the protection of the road itself" (*ibid.*, 430).

The only other case in which *McGregor v. Wanganui County Council* is referred to, so far as counsel can inform me, is *Henry v. Piako County* ((1911) 30 N.Z.L.R. 811), in which *McGregor's* case was only cited in argument. It is not dealt with in the judgment.

I think I am bound to follow the decision in *McGregor's* case and to hold that, as matters now stand, there is no statutory obligation under s. 261 of the Public Works Act cast upon a County Council to keep in repair mere road-drains such as run under the road abutting the plaintiff's land.

That, however, does not absolve the Council if it does anything with regard to roads under its control, which include the road-drains under it, whereby damage is caused to the land of an adjoining owner. That matter resolves itself into the consideration of the question of non-feasance or misfeasance. The dividing line between nonfeasance and misfeasance is not always easy to determine: see on this *Robinson on Public Authorities and Legal Liabilities*, 183 *et seq.*, and *Shoreditch Corporation v. Bull* ((1904) 90 L.T. 210). Much must depend on the facts in each case.

Now as to misfeasance. In *McClelland v. Manchester Corporation* ([1912] 1 K.B. 118), *Lush, J.*, says, speaking of the distinction between non-feasance and misfeasance: "You cannot sever what was omitted or 'left undone from what was committed or actually done, and say that 'because the accident was caused by the omission therefore it was non-feasance. Once establish that the local authority did something to the 'road, and the case is removed from the category of nonfeasance. If 'the work was imperfect and incomplete it becomes a case of misfeasance 'and not nonfeasance, although damage was caused by an omission to do 'something that ought to have been done. The omission to take pre-cautions to do something that ought to have been done to finish the 'work is precisely the same thing in its legal consequence as the commission of something that ought not to have been done, and there is no 'similarity in point of law between such a case and a case where the 'local authority have chosen to do nothing at all" (*ibid.*, 127).

An examination of a variety of cases on the subject of misfeasance and non-feasance by local bodies satisfies me that in the present instance there have been definite acts of misfeasance by the local body: particularly is this so with regard to culverts Nos. 2 and 5. With regard to culvert No. 4, which was blocked by the gorse-bush, I am inclined to the view that failure to remove that gorse-bush was an act of misfeasance within the observations of *Lush, J.*, cited above. Evidence was given on behalf of the Council that it was the duty of its roadmen to keep the culverts clear. In doing this, they are supposed to clear away overhanging matter, clean out water-tables, &c. It is obvious on the evidence that there had been a failure on the part of the roadmen to cut away this bush which had been growing by the mouth of culvert No. 4 for a long time. The evidence of the roadmen called for the Council was not at all convincing, and I think over quite long periods they have failed to carry out their duties efficiently. It should have been apparent to any competent roadman that the gorse-bush by No. 4 culvert was a source of potential danger. It was argued that the Council was not bound to do anything to keep clear the culverts. That may be so. But the evidence is that its roadmen periodically—at long intervals, I think—did inspect and carry out work upon the roads and water-tables. In doing that work they are bound to do it properly; and if, whether by acts of either commission or omission

on their part, in carrying out the work they do, the culverts become blocked, that, in my view, brings the Council within the cases as to misfeasance.

I think the following authorities support the view I have taken on the question of misfeasance by the Council: *Essendon Corporation v. McSweeney* ((1914) 17 C.L.R. 524), *Bathurst Borough v. Macpherson* ((1879) 4 App. Cas. 256), *Fortescue v. Te Awamutu Borough* ([1920] N.Z.L.R. 281), and *Ham v. Blenheim Corporation* ([1921] N.Z.L.R. 358). These authorities all go to show that, where a local body actively does something with regard to a road or to drains within its control and thereby creates any danger which results in damage, a plaintiff may recover. A local body is permitted by law to pursue what one learned Judge has referred to as "a policy of masterly inactivity" with regard to roads or drains or bridges. It can do nothing and these things can get completely out of repair and the Council not be liable. Once, however, it does anything, it must do its work properly, and without negligence.

It was also strongly argued for the Council that, even if, on the evidence, it is held that culvert No. 2 was blocked by Council men, they had acted beyond their authority, and that the plaintiff is under an onus to show that they acted with authority: *Beard v. London General Omnibus Co.* ([1900] 2 Q.B. 530); see also *Salmond on Torts*, 10th Ed. 89, 92. I think that the evidence clearly establishes the authority of the Council roadmen to see that culverts are kept clean and open. In this case, they failed in that duty. It matters not that they departed from what was clearly their duty. It was due to their neglect or bad work that all the three culverts I have numbered Nos. 2, 4, and 5 were blocked, and for that I think the Council is liable.

It may be argued that, in a case such as this, the Court is left largely to conjecture as to the real cause of this slip. There is, however, both direct and circumstantial evidence to support plaintiff's claim. The circumstantial evidence is such that, to use *Lord Cockburn's* phrase, "the facts in the present case speak, in a whisper it is true, but still audibly." I think one may go further and say, as the Full Court said in *Stoddart v. Ashburton County* ([1926] N.Z.L.R. 399), "the facts of the present case speak not in a whisper, but quite clearly and distinctly" (*ibid.*, 407).

On the question of damages: I find it impossible to determine with any exactitude how much damage is to be attributed to the fact that three out of these five culverts were entirely, or almost entirely, blocked at the time of the flood. The remaining one, No. 3, was partially blocked, but for that the Council is not liable.

On the basis that three out of five of these 9-in. culverts were not functioning at all during the storm in February, I hold that, of the special damages proved to have been suffered by the plaintiff, £63 2s., £50 should be borne by the Council.

As there was little evidence of general damage, though some undoubtedly was suffered, I fix that at £5, and give judgment for the plaintiff for £55, with costs according to scale and witnesses' expenses, which I will fix if counsel cannot agree upon them.

Judgment for the plaintiff accordingly.

Solicitor for the plaintiff: *G. H. A. Swan* (Wellington).

Solicitors for the defendant: *Brandon, Ward, and Hislop* (Wellington).

LAURENS v. GLEN EDEN TOWN BOARD.

1948. April 19, May 6, before Mr. J. H. LUXFORD, S.M., with Assessors, at Auckland.

Public Works—Road widened and Natural Surface lowered—Ramp constructed from Carriage-way to Section—Strip left between Carriage-way and Section higher than Road-surface—Ramp Sole Access to Section for Vehicular Traffic—Removal of Ramp as Part of Road-widening Scheme—Section-owner entitled to Compensation—"Public work"—Municipal Corporations Act, 1933, ss. 174 (4) (a), 200.

The claimant was the owner of four sections of land at Glen Eden, two with a frontage to View Road and two with a frontage to Fairview Road. In 1924, the Town Board graded the carriage-way of View Road, thus lowering the natural surface of the road-way to a depth of about 4 ft. opposite the two sections fronting that street, and leaving a sloping area 21 ft. wide between the claimant's boundary and the top of the bank, caused by the lowering of the carriage-way. The strip retained its natural slope. A ramp of a width of 15 ft. was made by placing earth alongside the bank nearest to the land of the claimant, who was thus enabled to have vehicular access to the section on which his house and out-buildings stood. The toe of the ramp protruded towards the metalled portion of the carriage-way, and a 9-in. piped culvert ran through the ramp. The ramp, which was constructed by the Board in 1924, was used continuously until August, 1947, by the claimant and his predecessors in title.

In May, 1947, the Board authorized the widening of the metalled portion of the carriage-way. The ramp was removed, and the claimant's means of vehicular access was taken away. The only means by which an equivalent means of access could be obtained by the claimant's section would be by making an entrance from Fairview Road, and this would cost not less than £250. The claimant sought that sum by way of compensation.

Held, 1. That the removal of the ramp was not the removal of an obstruction to the road, but was an integral part of the widening work, and became necessary because of it.

2. That, as the work constituted both construction and repair work, done by the Board in pursuance of the powers conferred on it by s. 174 (4) (a) of the Municipal Corporations Act, 1933, the widening of the street and the other work done in May, 1947, were a "public work," within the meaning of that term as defined in s. 2 of the Public Works Act, 1928.

3. That the ramp was not a temporary structure; and the fact that the 21 ft. strip between the carriage-way of the road and the claimant's boundary was on a different level from the carriage-way and had not been constructed in any permanent manner was irrelevant; the claimant was not barred by s. 200 of the Municipal Corporations Act, 1933, and she was entitled to compensation.

Boyd v. Mayor, &c., of Wellington (1913) 32 N.Z.L.R. 1149 followed.

The assessment of the amount of compensation was deferred.

CLAIM under the Public Works Act, 1928. The claimant was the owner of four pieces of land in the Glen Eden Town Board District containing in all 3 acres 17.3 perches. Two pieces (Lots 64 and 65) had a frontage to View Road and two pieces (Lots 59 and 60) had a frontage to Fairview Road. All the pieces were conjoined and formed the letter "L."

Before 1924, the carriage-way (if such it could be called) of View Road followed the natural slope of the ground, but during that year the Board graded the carriage-way so as to give it an even slope of 1 in 11. The effect of this was that the natural surface of the roadway was lowered to a depth of about 4 ft. opposite the boundary of Lots 64 and 65. The width of the carriage-way between water-tables was 15 ft. There was a distance of 21 ft. between the top of the bank (caused by the lowering of the carriage-way) and the claimant's boundary. This 21-ft. strip retained its natural slope. The Board, however, cut a footway of a width of 6 ft. along the surface of the strip and spread shingle along it. The carriage-way was metalled along its centre. A ramp having a width of about 15 ft. was made by placing earth alongside the bank nearest to the claimant's land. The toe of the ramp protruded towards the metalled portion of the carriage-way. Although it had a steep slope, it enabled the plaintiff to have vehicular access to Lot 65, on which his house and outbuildings stood. A 9-in. piped culvert ran through the ramp, which otherwise would have interfered with the storm-water running in the water-tables. The Board called evidence to show that it had no record of having authorized the construction of this ramp, but the inference drawn by the Court was that it was constructed by the Board in 1924, and had been used continuously until August, 1947, by the claimant and her predecessors in title for the purpose of obtaining vehicular access to her property.

View Road until a few years ago was used very little, and, except for the metalled carriage-way and the footpath, became overgrown with gorse, blackberry, and weeds. The district has developed somewhat rapidly of recent years, and it became necessary for the Board to improve View Road. In May, 1947, the Board authorized the widening of the metalled portion of the carriage-way and the clearing of all weeds from the shoulders. This meant that the ramp would create an obstruction to the carriage-way, as its toe would protrude beyond the metalled edge. So, when the work was being carried out, the ramp was removed, with the result that the claimant's means of vehicle access had been taken away. The only means by which an equivalent means of access could be obtained (unless the Board allowed a driveway to cut through the bank, and the 21-ft. strip to the boundary) was by constructing an entrance from Fairview Road, and a driveway along the southern boundary of Lot 60 to Lot 64 and then along the eastern boundary of Lot 64. The cost of this had been proved to be not less

than £250, and the claimant accordingly sought that sum by way of compensation.

Winter, for the claimant.

Baxter, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by

LUXFORD, S.M. Mr. *Baxter* has raised three legal defences to the claim. The first ground of defence is that the ramp caused an obstruction to the road, and the Board was entitled to remove the obstruction by virtue of its common-law right as owner of the freehold of land along which the road runs. We do not accept the validity of this contention. There is no evidence that the ramp caused any obstruction to the carriage-way before the work carried out in May, 1947. Consequently, the removal of the ramp was an integral part of that work, and became necessary because of it.

The second ground of defence is that the 1947 work was not "a public work" within the meaning of the Public Works Act, 1928. This Act (s. 2) defines "public work" to mean and include (*inter alia*) "every work which . . . any local authority is authorized to undertake under this or any other Act."

The 1947 work constituted, in our opinion, both construction and repair work. The carriage-way had been neglected since its construction in 1924, and all that was done in 1947 was to put it in proper order. This was done by the Board in pursuance of the powers conferred on it by s. 17 (4) (a) of the Municipal Corporations Act, 1933: "To construct and repair all streets with such materials and in such manner as the [Board] thinks fit." The expression "construct a street" is not, as *Bramwell*, L.J., pointed out in *Baker v. Portsmouth Corporation* (1878) 3 Ex.D. 157, 158, a common expression. The learned Lord Justice added: "We speak generally of the construction of a house, or the 'laying out of a street' (*ibid.*, 158). In s. 175 (3) both expressions are used:

"no street shall be laid out or constructed by the Council with a steeper grade in any part of its length than one inch in twelve inches."

It seems to us that the Legislature has used the word "construct" in subs. 4 (a) in reference to any new work done on a street vested in the local body, for the purpose of making it suitable for the traffic it has to carry, and the word "repair" in reference to the maintenance of construction work already carried out. It follows, therefore, that the 1947 work constituted a "public work" within the meaning of the Public Works Act, 1928.

The third ground of defence is that the provisions of s. 200 of the Municipal Corporations Act, 1933, deprive the claimant of any right to compensation. That section is as follows:

"No compensation shall be payable by the [Board] in respect of an alteration in the level of any street . . . unless such alteration has been made after such level has been fixed under this Act . . . or after such street has been constructed in some permanent manner by any local authority having the power to do so."

The evidence shows that work done in 1924 amounted to a construction of the street in some permanent manner. The words "some permanent manner" do not relate to the material used to surface the street, but have reference to level of the street. The plans prepared by the Board clearly show that the whole length of the carriage-way of View Road was graded by means of extensive excavations and fillings. The ramp does not appear on the plans, but it was constructed as an integral part of the street. It was not a temporary structure. Apart from the fact that it remained intact until demolished in 1947, it was constructed with a piped culvert at its base, so that storm-waters would flow through from one side to the other.

We have considered carefully the argument submitted to us by Mr. Baxter. He relied on the fact that the 21 ft. strip between the carriage-way of the road and the claimant's boundary is on a different level from the carriage-way and has not been constructed in any permanent manner. That, in our opinion, is not relevant, because the alteration of the level caused by the removal of the ramp did not affect the 21-ft. strip.

The principle to be applied in construing s. 200 was stated by *Sim, J.*, in *Boyd v. Mayor, &c., of Wellington* ((1913) 32 N.Z.L.R. 1149) thus: "Where part only of a street has been constructed in some permanent manner, and the level of that part is altered afterwards, it seems reasonable to say that such alteration gives a right to compensation, and that is how the statute . . . ought to be construed" (*ibid.*, 1154).

It follows, therefore, that the claimant has established her right to compensation.

We propose to defer assessing the compensation as the evidence shows that a very much cheaper means of access can be provided than that proposed by the claimant. That means, however, cannot be adopted without the concurrence of the Board, as it would involve excavating portion of the street between the carriage-way and the claimant's boundary. We propose, therefore, to adjourn the hearing until July 1, 1948. Now that this Court has affirmed the claimant's right to compensation, the parties may be able to come to a settlement to their mutual advantage.

Judgment accordingly.

Solicitors for the claimant: *Jenkins and Winter* (Auckland).

Solicitors for the defendant: *Wynyard, Wilson, and Baxter* (Auckland).

[IN THE COMPENSATION COURT.]

GOODALL v. PALMERSTON NORTH CITY CORPORATION.

COMPENSATION COURT. Wellington. April 28. ONGLEY, J.

Workers' Compensation—Assessment—Permanent Partial Incapacity—Non-Schedule Injury—Worker paid Compensation by Employer during Total Incapacity—Full Pre-accident Wages paid him during Later Period of Employment—Such Period not deductible from Six-years' Compensation Period—Rate of Compensation to be based on Loss of Earnings—Workers' Compensation Act, 1922, s. 5.

The plaintiff was employed by the defendant corporation on February 7, 1943, when he met with an accident, which arose out of and in the course of his employment. He was totally incapacitated until August 29, 1944, and was paid full compensation to that date. He suffered a permanent 40 per cent. disability. He was again employed by the defendant corporation from August 20, 1944, to November 27, 1945, a period of sixty-six weeks, at his pre-accident rate of wages.

The questions for the Court were whether the sixty-six weeks during which the plaintiff was employed were to come off the full compensation period of 313 weeks, and whether the rate of compensation was to be based on his actual earnings or on the extent of his injury (40 per cent. total).

Held, 1. That the plaintiff's incapacity was continuous from the date of the accident, and, accordingly, the period of incapacity (or partial incapacity) ran from that date, and was not broken or interrupted by the sixty-six weeks' employment, which was to be included in the total period of 313 weeks.

Scott v. Harraway(1) applied.

2. That, pursuant to s. 5 (6) of the Workers' Compensation Act, 1922, the rate of compensation, in such a case, is to be based on the "loss of earnings" where that can be ascertained and, where it cannot, on the probable loss of earnings.

(1) [1927] G.L.R. 18.

ACTION claiming compensation under the Workers' Compensation Act, 1922.

This action came on for hearing before *O'Regan, J.*, at Palmerston North, on April 20, 1945. The following facts were agreed upon.

The plaintiff met with an accident on February 7, 1943. The accident arose out of and in the course of the plaintiff's employment by the defendants. The plaintiff's average weekly earnings before the accident were £4 17s. 5d. per week. The plaintiff was totally incapacitated until August 20, 1944, and was paid full compensation to that date. The plaintiff has suffered a permanent disability of 40 per cent. of total disability. The plaintiff had been employed by the defendants from August 20, 1944, to the date of hearing of the action at his full pre-accident rate of wages.

The hearing of the action was adjourned by the Court, and His Honour made a minute as follows:

Adjourned pending further order of the Court, it having been agreed that the plaintiff is to be continued in his pre-accident employment by the defendant City Council and at the same rate of wages and that if and when the employment shall have been terminated the jurisdiction of the Court may again be invoked.

Plaintiff's employment with the defendants was terminated by the defendants on November 27, 1945, and he was on Social Security until March 23, 1946, and then got employment as an under-rate worker.

- A. M. Ongley, for the plaintiff. The plaintiff is entitled to the total period of 313 weeks, inclusive of the time during which he was employed by the corporation. He worked for the corporation as part of the period of employment: *Scott v. Harraway and Sons, Ltd.*(1), which was the first case in which the period of 313 weeks was interpreted. *Phillips v. Wellington City Corporation*(2) was a non-Schedule case: see the calculation of the lump sum(3). The solicitor for the defendant cited *Scott's* case(4) as good law, against the defendant; and payment for 313 weeks was granted. If the statement of the law in *Fairman v. Grey Valley Collieries, Ltd.*(5) is correct, then the plaintiff in this case has received compensation for eighty weeks' total disablement and is entitled to the balance of 233 weeks at 40 per cent. of the total incapacity. Counsel have agreed on the amount as being £1 6s., but disagree on the period.
- 15 H. R. Cooper, for the defendant corporation. This being a non-Schedule injury, the provision as to the full amount of compensation payable under s. 8 of the Workers' Compensation Act, 1922, in the case of Schedule injuries, does not apply here. There is no suggestion that plaintiff lost his employment with the City Council because of his inability to do his work. A man might go on for years with a disability, die still earning his wages, and yet there would be this liability to pay for four or five years. That is not the law, as is clear from *Dobson v. Maling and Co., Ltd.*(6) and *Hurrey v. The King*(7). If the worker suffered a Schedule injury, there is a fixed specific amount, and it does not matter whether he is disabled for the rest of his life; but that does not apply to a non-Schedule injury, which deals with the loss of earning-capacity, and that must be found by the Court. The fact that plaintiff has been working is a factor for the Court's consideration; although he was injured, he is getting more than £1 6s. (his 40 per cent. disability compensation); but he cannot get his wages and also £1 6s. Within the period of six years, he is entitled to compensation to the extent to which he earns less wages during that period. If during the whole of that period he is earning full wages, then he gets no compensation, as he is not entitled to it: there should be no compensation period running unless he is entitled to compensation.

[ONGLEY, J. But is he not entitled to six years' compensation?]

The compensation period is limited to six years from the date of the accident: that is the effect of s. 5 (7).

- A. M. Ongley, in reply. Irrespective of what the worker is earning, he is entitled to compensation on 40 per cent. disablement. In *Dobson's* case(8) the Judge referred to the "aggregate period" of 313 weeks. Mr. Cooper says that the plaintiff has suffered no injury because he may earn full wages for six years. But, when he has been put off during or at the end of six years, he still has suffered a very considerable injury. He can be compensated immediately, or the case can be adjourned. He is entitled to compensation for 313 weeks, no matter what the amount. The plaintiff has received compensation for eighty weeks, and he is entitled to the balance at the rate of 40 per cent. of his industrial loss.

Cur. adv. vult.

(1) [1927] G.L.R. 18.

(2) [1941] N.Z.L.R. 134.

(3) *Ibid.*, 140.

(4) [1927] G.L.R. 18.

(5) [1943] N.Z.L.R. 368, 371, 372, 373, 374.

(6) [1947] N.Z.L.R. 123.

(7) [1943] N.Z.L.R. 278, 286.

(8) [1947] N.Z.L.R. 123.

ONGLEY, J. Two matters are at issue between the parties and have been referred to this Court for decision. The first is whether the sixty-six weeks during which plaintiff was employed by the defendant corporation is to come off the 313 weeks (full compensation period). The second question is the rate of compensation—i.e., is it to be based on his actual earnings or on the extent of his injury (40 per cent. total)?

Counsel for plaintiff cites *Scott v. Harraway and Sons, Ltd.*(1), *Phillips v. Wellington City Corporation*(2), and *Fairman v. Grey Valley Collieries, Ltd.*(3). Counsel for defendants cites *Dobson v. Maling and Co., Ltd.*(4) and *Hurrey v. The King*(5). He distinguishes *Scott v. Harraway and Sons, Ltd.*(6) on the ground that that was a Schedule injury case whereas this is not, and submits that "plaintiff is entitled to compensation 'during the period of incapacity,'" that "that period in this case is continuous and cannot be affected by the fact that, although not as capable as before, the defendants generously paid the plaintiff full wages for the period from August 20, 1944, to November 27, 1945, as if he was as capable as before he met with the accident on February 7, 1943," and that "it will be a travesty of justice if the defendants are to be compelled to suffer for their generosity in employing the plaintiff at full wages during his period of partial incapacity."

The first issue turns on s. 5 (6) and (7) (as amended) of the Act. Nothing turns on subs. 8. Subsection 9 was not referred to: see *Wood v. Wentworth Silkstone Colliery Co., Ltd.*(7). The submission for defendant is that the incapacity was continuous from the date of the accident, and accordingly "the period of incapacity" (or partial incapacity) ran from that date and was not broken or interrupted by the sixty-six weeks' employment; that the compensation period is limited to 313 weeks (six years) by subs. 7, and, accordingly, is for 313 weeks, starting at the date of the accident (because it was a continuous period of incapacity or partial incapacity), and, therefore, includes the sixty-six weeks, with the result that the sixty-six weeks must be deducted from the 313 weeks, leaving 247 (of which the plaintiff had been on full compensation for eighty weeks). No question arises as to the eighty weeks. That was, in effect, the submission for defendant in *Scott v. Harraway and Sons, Ltd.*(8), which was a Schedule injury case. Subsection 6 provides for weekly payment of compensation "during any period of 'partial incapacity'"—that is, without limit. Subsection 7 limits the weekly payments. (They "shall in no case extend over a longer aggregate period than six years.") The reasoning in *Scott v. Harraway and Sons, Ltd.* seems to apply. The period of incapacity (or partial incapacity) cannot be limited. That period depends on the nature of the accident, but the weekly payments to be made during that period can be limited. My view is that subs. 7 limits the payment period, not the incapacity period. The limit is an aggregate of six years within the incapacity period. While plaintiff was on wages, he was not on compensation—that is, for the sixty-six weeks. Accordingly, that period cannot be deducted from the 313 weeks.

The next is the rate of compensation. Plaintiff has a 40 per cent. injury. It is submitted for him that "irrespective of what he is earn-

(1) [1927] G.L.R. 18.
 (2) [1941] N.Z.L.R. 134.
 (3) [1943] N.Z.L.R. 368.
 (4) [1947] N.Z.L.R. 123.
 (5) [1943] N.Z.L.R. 278

(6) [1927] G.L.R. 18.
 (7) (1925) 133 L.T. 656; 18 B.W.C.C. 278.
 (8) [1927] G.L.R. 18.

"ing he is entitled to compensation on a 40 per cent. disablement." Subsection 6 provides:

the weekly payment shall be an amount equal to sixty-six and two-thirds per centum of the difference between the amount of the worker's weekly earnings at the time of the accident and the weekly amount which the worker is earning after the accident in any employment or business, or is able to earn in some suitable employment provided or found for him after the accident by the employer by whom he was employed at the time of the accident, but not exceeding in any case four pounds ten shillings a week.

- 10 That puts the compensation on a loss-of-earnings basis. A lump sum payment under s. 5 (3) is to be the present value:

of the aggregate of the weekly payments which in the opinion of the Court would probably become payable to the worker during the period of his incapacity if compensation by way of a weekly payment were then awarded in lieu of a lump sum.

- 15 Under s. 5 (6), actual loss of earnings is the basis, but under s. 5 (3) the future is being dealt with, hence the "probably become payable" provisions, but that does not alter the basis from a loss-of-earnings basis, except so far as the loss of future earnings has to be estimated on a "probably" basis.

- 20 On the questions at issue, I hold that the sixty-six weeks cannot be deducted from the 313 weeks, and I hold that the rate is on the "loss-of-earnings" basis where that can be ascertained, and on the probable loss of earnings, where it cannot.

- I do not know why plaintiff left his employment with the defendant corporation on November 27, 1945, nor why he was not working from some time after that date. At the Bar, it was said, "There is no suggestion plaintiff lost his employment with the City Council because of his inability to do his work." Accordingly, I am unable to decide anything about that period. That point was not referred to the Court.
- 30 For the period since he has gone back to work, his compensation is fixed by s. 5 (6) at two-thirds of the difference in earnings. I have no information on which to estimate his probable future earnings. His present job may or may not continue; I do not know. The points in dispute were the sixty-six weeks and whether the compensation rate
- 35 was to be on a percentage-of-disability basis.

If there is any other matter on which agreement cannot be reached, it can be referred to the Court.

I allow plaintiff £10 10s. costs.

Order accordingly.

Solicitors for the plaintiff: *A. M. and J. A. Ongley* (Palmerston North).

Solicitors for the defendants: *Cooper, Rapley, and Rutherford* (Palmerston North).

In re AITKEN AND OTHERS.

1947. October 1, 2, 31, before Mr. A. E. DOBBIE, S.M., at Mosgiel.

Rates and Rating—Urban Farm Land—Objections—Objection on Ground that Land is not “farm land”—Objection not in Writing—No Jurisdiction to entertain such Objection—“Urban farm land”—Land without Sewerage System—Substantial Part of Income from Land not derived from Use for Prescribed Farming Purposes—Whether such Land within Definition—Urban Farm Land Rating Act, 1932, ss. 2, 6, 13.

When an objection is made to a farm-land list under s. 6 of the Urban Farm Land Rating Act, 1932, on the sole ground of the unfairness or incorrectness of the special rateable value therein, but there is no objection in writing against the farm-land list, any objection at the hearing upon the ground that the land was incorrectly inserted in the list is not a “relevant matter” within the meaning of that term as used in s. 13, since the Court’s jurisdiction is limited by s. 13 (1) to alteration of the farm-land list only in respect of any matter set out in a written objection.

Semble, 1. Land is not within the definition of “urban farm land” in s. 2 as being “used exclusively or principally” for one of the prescribed farming purposes set out in para. (b) of that definition unless the person using the land for any such purpose derives the whole or a substantial part of his income therefrom.

2. Land is not within the definition of “urban farm land” in s. 2, as being “fit for subdivision for building purposes or likely to be required for building purposes within a period of five years” (as those words appear in para. (c) of that definition), unless in the meantime such property be connected with the sewerage and drainage system of the borough in question.

Note : Section 6 of the Urban Farm Land Rating Act, 1932, provides :

6 (1) The farm-land list shall remain open for inspection in the public office of the Council for a period of twenty-one days, and at any time within that period, or within any extended period that may be allowed by the Council, any person having an interest in any land liable to be rated by the Council may object to the list on the ground of the unfairness or incorrectness of any special or rateable value in the list, or of the insertion or incorrectness of any matter therein, or the omission of any matter therefrom.

(2) Every such objection shall be in writing under the hand of the objector, or of his solicitor or duly authorized agent, and shall be lodged at the public office of the Council.

(3) If within the period fixed as provided in subsection one hereof no objections are lodged, the list shall be signed by two members of the Council, and shall be the farm-land roll for the borough.

OBJECTIONS by a number of ratepayers to the farm-land list for the Borough of Mosgiel, before an Assessment Court constituted under the Urban Farm Land Rating Act, 1932, on October 1 and 2, 1947.

I. B. Stevenson and *N. W. Allan*, for Isabella Aitken and eighteen other objectors.

G. T. Baylee, for J. C. and W. N. Muirhead, objectors.

H. S. Adams, for the trustees of the estate of Thomas E. Wilkins, deceased, an objector.

E. Anderson and *C. G. Gray*, for the Mosgiel Borough Council.

Cur. adv. vult.

DOBBIE, S.M. All the objections to the list were on the ground of the unfairness or incorrectness of the special rateable value in the list, and also some objections included the further ground that the trade or occupation of the objector was incorrectly stated in the said list. No objection to the list on the ground of the insertion of any matter therein or of the omission of any matter therefrom was lodged or received by the Assessment Court. This is important to record because all the counsel for the objectors contend that the sole function of the Court is to hear and determine the matter involved in each particular objection, and, if any other matter on which there could have been a valid objection arises on such hearing, but no such objection has been lodged thereto, such matter is not open for determination by the Court. In other words, the Court is empowered to hear the specific objections and those only, and the question whether the land subject to the objection is farm land or not is not in issue where the objection relates solely to the special rateable value thereof. For this contention they rely on s. 13 of the Urban Farm Land Rating Act, 1932. Before proceeding to consider this section, it is necessary to state some facts about the preparation of the farm-land list for the borough by the Mosgiel Borough Council. A new valuation roll was made for the borough, and, consequently, under s. 18 of the Urban Farm Land Rating Act, 1932, a new farm-land roll had to be made for the borough. The rating system in force in the borough is on the unimproved value. The new valuation roll increased by a considerable amount the unimproved value of the land in the borough. A farm-land roll was in existence in the borough, and the Council brought all the existing farm land shown in such roll into the new farm-land list, and in most cases, where an objection is lodged, made no difference between the ordinary rateable value and the special rateable value therein; or, in other words, the objectors obtained no relief from being on the urban farm-land list. This is contrary to the spirit of the Urban Farm Land Rating Act, 1932, the preamble of which states that it is :

“ an Act to make special provisions in respect of the rating of
“ urban farm land with a view to affording relief to the occupiers
“ thereof.”

The Council granted no relief, because they considered either the land involved therein was not urban farm land and/or any reduction made in the special rateable value would be likely to impose an undue burden of rates on the ratepayers of the borough. Under subs. 4 of s. 4 of the Urban Farm Land Rating Act, 1932 :

In re AITKEN AND OTHERS.

1947. October 1, 2, 31, before Mr. A. E. DOBBIE, S.M., at Mosgiel.

Rates and Rating—Urban Farm Land—Objections—Objection on Ground that Land is not “farm land”—Objection not in Writing—No Jurisdiction to entertain such Objection—“Urban farm land”—Land without Sewerage System—Substantial Part of Income from Land not derived from Use for Prescribed Farming Purposes—Whether such Land within Definition—Urban Farm Land Rating Act, 1932, ss. 2, 6, 13.

When an objection is made to a farm-land list under s. 6 of the Urban Farm Land Rating Act, 1932, on the sole ground of the unfairness or incorrectness of the special rateable value therein, but there is no objection in writing against the farm-land list, any objection at the hearing upon the ground that the land was incorrectly inserted in the list is not a “relevant matter” within the meaning of that term as used in s. 13, since the Court’s jurisdiction is limited by s. 13 (1) to alteration of the farm-land list only in respect of any matter set out in a written objection.

Semble, 1. Land is not within the definition of “urban farm land” in s. 2 as being “used exclusively or principally” for one of the prescribed farming purposes set out in para. (b) of that definition unless the person using the land for any such purpose derives the whole or a substantial part of his income therefrom.

2. Land is not within the definition of “urban farm land” in s. 2, as being “fit for subdivision for building purposes or likely to be required for building purposes within a period of five years” (as those words appear in para. (c) of that definition), unless in the meantime such property be connected with the sewerage and drainage system of the borough in question.

Note : Section 6 of the Urban Farm Land Rating Act, 1932, provides :

6 (1) The farm-land list shall remain open for inspection in the public office of the Council for a period of twenty-one days, and at any time within that period, or within any extended period that may be allowed by the Council, any person having an interest in any land liable to be rated by the Council may object to the list on the ground of the unfairness or incorrectness of any special or rateable value in the list, or of the insertion or incorrectness of any matter therein, or the omission of any matter therefrom.

(2) Every such objection shall be in writing under the hand of the objector, or of his solicitor or duly authorized agent, and shall be lodged at the public office of the Council.

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Cur. adv. vult.

DOBBIE, S.M. All the objections to the list were on the ground of the unfairness or incorrectness of the special rateable value in the list, and also some objections included the further ground that the trade or occupation of the objector was incorrectly stated in the said list. No objection to the list on the ground of the insertion of any matter therein or of the omission of any matter therefrom was lodged or received by the Assessment Court. This is important to record because all the counsel for the objectors contend that the sole function of the Court is to hear and determine the matter involved in each particular objection, and, if any other matter on which there could have been a valid objection arises on such hearing, but no such objection has been lodged thereto, such matter is not open for determination by the Court. In other words, the Court is empowered to hear the specific objections and those only, and the question whether the land subject to the objection is farm land or not is not in issue where the objection relates solely to the special rateable value thereof. For this contention they rely on s. 13 of the Urban Farm Land Rating Act, 1932. Before proceeding to consider this section, it is necessary to state some facts about the preparation of the farm-land list for the borough by the Mosgiel Borough Council. A new valuation roll was made for the borough, and, consequently, under s. 18 of the Urban Farm Land Rating Act, 1932, a new farm-land roll had to be made for the borough. The rating system in force in the borough is on the unimproved value. The new valuation roll increased by a considerable amount the unimproved value of the land in the borough. A farm-land roll was in existence in the borough, and the Council brought all the existing farm land shown in such roll into the new farm-land list, and in most cases, where an objection is lodged, made no difference between the ordinary rateable value and the special rateable value therein; or, in other words, the objectors obtained no relief from being on the urban farm-land list. This is contrary to the spirit of the Urban Farm Land Rating Act, 1932, the preamble of which states that it is:

“an Act to make special provisions in respect of the rating of
“urban farm land with a view to affording relief to the occupiers
“thereof.”

The Council granted no relief, because they considered either the land involved therein was not urban farm land and/or any reduction made in the special rateable value would be likely to impose an undue burden of rates on the ratepayers of the borough. Under subs. 4 of s. 4 of the Urban Farm Land Rating Act, 1932:

In re AITKEN AND OTHERS.

1947. October 1, 2, 31, before Mr. A. E. DOBBIE, S.M., at Mosgiel.

Rates and Rating—Urban Farm Land—Objections—Objection on Ground that Land is not “farm land”—Objection not in Writing—No Jurisdiction to entertain such Objection—“Urban farm land”—Land without Sewerage System—Substantial Part of Income from Land not derived from Use for Prescribed Farming Purposes—Whether such Land within Definition—Urban Farm Land Rating Act, 1932, ss. 2, 6, 13.

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Semble, 1. Land is not within the definition of “urban farm land” in s. 2 as being “used exclusively or principally” for one of the prescribed farming purposes set out in para. (b) of that definition unless the person using the land for any such purpose derives the whole or a substantial part of his income therefrom.

2. Land is not within the definition of “urban farm land” in s. 2, as being “fit for subdivision for building purposes or likely to be required for building purposes within a period of five years” (as those words appear in para. (c) of that definition), unless in the meantime such property be connected with the sewerage and drainage system of the borough in question.

Note : Section 6 of the Urban Farm Land Rating Act, 1932, provides :

6 (1) The farm-land list shall remain open for inspection in the public office of the Council for a period of twenty-one days, and at any time within that period, or within any extended period that may be allowed by the Council, any person having an interest in any land liable to be rated by the Council may object to the list on the ground of the unfairness or incorrectness of any special or rateable value in the list, or of the insertion or incorrectness of any matter therein, or the omission of any matter therefrom.

(2) Every such objection shall be in writing under the hand of the objector, or of his solicitor or duly authorized agent, and shall be lodged at the public office of the Council.

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DOBBIE, S.M. All the objections to the list were on the ground of the unfairness or incorrectness of the special rateable value in the list, and also some objections included the further ground that the trade or occupation of the objector was incorrectly stated in the said list. No objection to the list on the ground of the insertion of any matter therein or of the omission of any matter therefrom was lodged or received by the Assessment Court. This is important to record because all the counsel for the objectors contend that the sole function of the Court is to hear and determine the matter involved in each particular objection, and, if any other matter on which there could have been a valid objection arises on such hearing, but no such objection has been lodged thereto, such matter is not open for determination by the Court. In other words, the Court is empowered to hear the specific objections and those only, and the question whether the land subject to the objection is farm land or not is not in issue where the objection relates solely to the special rateable value thereof. For this contention they rely on s. 13 of the Urban Farm Land Rating Act, 1932. Before proceeding to consider this section, it is necessary to state some facts about the preparation of the farm-land list for the borough by the Mosgiel Borough Council. A new valuation roll was made for the borough, and, consequently, under s. 18 of the Urban Farm Land Rating Act, 1932, a new farm-land roll had to be made for the borough. The rating system in force in the borough is on the unimproved value. The new valuation roll increased by a considerable amount the unimproved value of the land in the borough. A farm-land roll was in existence in the borough, and the Council brought all the existing farm land shown in such roll into the new farm-land list, and in most cases, where an objection is lodged, made no difference between the ordinary rateable value and the special rateable value therein; or, in other words, the objectors obtained no relief from being on the urban farm-land list. This is contrary to the spirit of the Urban Farm Land Rating Act, 1932, the preamble of which states that it is:

“an Act to make special provisions in respect of the rating of
“urban farm land with a view to affording relief to the occupiers
“thereof.”

The Council granted no relief, because they considered either the land involved therein was not urban farm land and/or any reduction made in the special rateable value would be likely to impose an undue burden of rates on the ratepayers of the borough. Under subs. 4 of s. 4 of the Urban Farm Land Rating Act, 1932:

"The Council shall determine with respect to every property included in the farm-land list whether or not the rateable value should be reduced for the purposes of this Act, after taking into consideration all relevant matters, including the following:—

"(a) Whether the rates payable by the occupier are excessive or unduly burdensome:

"(b) The municipal services available to the property:

"(c) The incidence of general, special, and separate rates in the borough, and of taxes levied by or on behalf of rating authorities other than the Council:

"(d) Whether any reduction would be likely to impose an undue burden of rates on the other ratepayers of the borough or any of them:

"(e) Any alteration of the rateable value since the valuation roll came into force."

Subsection 5 then provides:

"The amount to which the Council determines to reduce the rateable value of any property, or, if it determines not to make any reduction, the existing rateable value, shall be entered in the farm-land list as the special rateable value of the property."

It is clear that under these two subsections the Council can determine not to reduce the rateable value of any property, but, of course, that is subject to an objection under s. 6 of the Act by "any person having an interest in any land liable to be rated by the Council." The objectors now come forward and say the Council has not taken into consideration all the matters which, by subs. 4 of s. 4, it was required to take into consideration in determining the special rateable value, and, consequently, they are entitled to relief. The Council rejoins by saying that some of the land involved in the objections is not urban farm land and should not be on the list. The objectors answer this by saying there is no objection lodged to the land being on the urban farm-land list, and, consequently, that matter is not in issue.

That raises the next question as to whether, on an objection to the list on the sole ground of the unfairness or incorrectness of the special rateable value therein, the Court can consider whether the land involved is urban farm land or not, and, if it be found to be not urban farm land, whether it has the power to erase it from the list. "Urban farm land" is defined in s. 2 of the Act as follows:

"'Urban farm land' means land (whether situated within a borough or not) which for the time being—

"(a) Is subject to any general, special, or separate rates made and levied by a Borough Council; and

"(b) Is used exclusively or principally for agricultural, horticultural, or pastoral purposes, or for the keeping of bees or poultry or other live-stock, by a person whose income or a substantial part thereof is derived from the use of land for any such purpose or purposes; and

"(c) Is not, in the opinion of the Council, Assessment Court, or Magistrate dealing with any application or objection under this Act, fit for subdivision for building purposes, or is not likely, in such opinion, to be required for building purposes

"within a period of five years from the date on which such opinion is expressed."

Shortly put, the land must be subject to rates, farmed by some person who derives a substantial part of his income therefrom, and must not be fit for building purposes. On the evidence adduced, it would be difficult for some of the land on the urban farm-land list to qualify with these conditions. In the preparation of the farm-land list the duty of the Council is set out in s. 4 of the Act. It reads as follows:

"(1) If on receipt of an application in accordance with the last preceding section it appears to the Council that a *prima facie* case for relief under this Act has been made out, the Council shall cause a farm-land list to be made for the borough in the form in the Schedule hereto or to the like effect.

"(2) The farm-land list shall contain particulars of—

"(a) All pieces of urban farm land containing not less than three acres which are liable to be rated separately by the Council

"(3) The particulars in the farm-land list, other than the special rateable value, shall be taken from the valuation roll."

Subsections 4 and 5 are already set out above.

It is abundantly clear that the urban farm list so prepared is to contain, subject to any objection lodged, only urban farm land—that is, land which will qualify with the conditions of urban farm land as defined by s. 2 of the Act. For, if no objection to the list is lodged in pursuance of s. 6 of the Act, the list, when signed by two members of the Council, becomes the farm-land roll for the borough. Subsection 3 of s. 6 provides:

"If within the period fixed as provided in subsection one hereof no objections are lodged, the list shall be signed by two members of the Council, and shall be the farm-land roll for the borough."

If no objection is lodged, there is no power for the Council to alter the list in any way before it becomes the farm-land roll.

It now becomes necessary to examine the position when an objection has been lodged. The jurisdiction and powers of the Assessment Court are set out in ss. 8 and 13 of the Act. Section 8 provides:

"For each borough there shall be an Assessment Court (hereinafter called the Court) for the purpose of hearing and determining all objections to the farm-land list for the borough."

Section 13 provides:

"(1) The Court shall hear and determine all objections lodged as hereinbefore provided (taking into consideration all relevant matters, including those mentioned in subsection four of section four hereof), and may alter the farm-land list in respect of anything objected to, by correcting any special rateable value therein, or by inserting any matter therein, or erasing any matter therefrom, which it is proved to the satisfaction of the Court ought to be altered, inserted, or erased, as the case may be. The Court shall have power to determine whether any property is urban farm land within the meaning of this Act.

"(2) When all objections have been disposed of the Judge shall initial all the alterations, insertions, and erasures (if any) made in

" the farm-land list, and shall sign the slip, and it shall be the farm-land roll for the borough."

It is clear from s. 8 that the Court exists for the purpose of hearing and determining all objections to the farm-land list for the borough. If there is no objection, there is no need for a Court; if there is an objection, the Court has to hear and determine it. But, if the objection is founded on one ground, as here, " the unfairness of the special rateable value fixed " by the Council," can the Court hear evidence to show that the land concerned in such objection is not, in fact, urban farm land, and, if so satisfied, erase such land from the list? That depends on the construction of s. 13, and especially the words " alter the farm-land list in respect of any-thing objected to, by . . . " The Court requires the power set out in the last paragraph of subs. 1 of s. 13—namely, " The Court shall have " power to determine whether any property is urban farm land within the " meaning of this Act "—when such a fact is brought directly in issue—for example, when an objector has lodged an objection to the list upon the ground that his land has been incorrectly omitted therefrom. In such a case, the question whether his land is urban farm land or not is directly in issue, and consequently it is necessary for the Court to have the power to determine it. This paragraph gives such power. But, when the objection is limited to the unfairness of the special rateable value, does the section give power to determine whether the land the subject of the objection is farm land or not and to erase it from the list? Section 6 gives the right to object to the list. It provides :

" (1) The farm-land list shall remain open for inspection in the " public office of the Council for a period of twenty-one days, and at " any time within that period, or within any extended period that may " be allowed by the Council, any person having an interest in any land " liable to be rated by the Council may object to the list on the ground " of the unfairness or incorrectness of any special rateable value in the " list, or of the insertion or incorrectness of any matter therein, or the " omission of any matter therefrom.

" (2) Every such objection shall be in writing under the hand of " the objector, or of his solicitor or duly authorized agent, and shall be " lodged at the public office of the Council."

It is clear from this section that an objection to the list must be (a) in writing, (b) lodged at the public office of the Council, (c) made within the time prescribed, (d) made by a person having an interest in any land liable to be rated by the Council, and (e) made on one or more of the grounds prescribed. This section leaves it wide open for any person, be he owner, occupier or other person having an interest in land liable to be rated by the Council, to lodge an objection to the farm-land list on one or more of the grounds specified. Such a person could object to the entry of any person's land on the farm-land list, and, on proof that such land was not farm land, have it erased therefrom. The question whether it was farm land or not would then be directly in issue. To enable the person affected to meet such an objection, s. 7 of the Act provides :

" (1) If any person objects to any entry in or omission from the " farm-land list, or to any value therein, affecting the interests of any " other person than the objector, the Town Clerk shall send to the person " so affected a copy of such objection."

The Town Clerk did not receive any objections which affected the interest of any other person than the objector, and consequently the present objectors have had no notice that the farm-land list was being attacked on the ground that their land was not farm land. Under s. 13, in determining any objection, the Court has to take into consideration all relevant matters. Is the question of their land being farm land a relevant matter when there is no objection in writing against the list upon the ground that their land was incorrectly inserted on the list? I do not think it is; the reason for the objection being in writing and for the notices under s. 7 is that any person affected by such objection will have notice that such a question will be raised and investigated at the hearing thereof. If such conditions are fulfilled, it then becomes a relevant matter.

It is also clear from subs. 3 of s. 6 that the farm-land list as prepared by the Council is deemed to contain only urban farm land. For, by that subsection, if no objections are lodged:

“the list shall be signed by two members of the Council, and shall be
“the farm-land roll for the borough.”

There is no power reserved for the Council to alter the list between the time of depositing it for inspection and the signing thereof by two members of the Council.

In my opinion, this view on the force and effect of ss. 6 and 7 assists in the interpretation of the words in s. 13 (1), “may alter the farm-land list in respect of anything objected to.” These words are words of limitation—that is, the Court has only power to alter the list in respect of any matter set out in a written objection. If anything on the list is objected to, it must be fortified by a written objection setting out the alteration required and the grounds for such alteration. The notice under s. 7 is a “copy of such objection.” This is the only way in which the persons affected can receive notice of it. If the persons affected do not receive notice of it, they are not required to meet it. Nobody has objected in writing to the objectors' land being entered on the farm-land list, and consequently, that is a “thing not objected to,” and the Court has no power to erase the land from the list. The “thing objected to” in the present objections is the unfairness or incorrectness of the special rateable value of the land involved. If, on an objection founded on one ground, any other ground of objection could not be put forward at the hearing, the efficacy of giving notice under s. 7 would be defeated.

The Assessment Court is a Court constituted to hear and determine written objections, and those only, and that is why the power under s. 13 is limited to “alter the farm-land list in respect of anything objected to.” If the “thing objected to” is not set out in a written objection, it is not properly before the Court, and the Court has no jurisdiction to alter the list in that respect.

But the definition of “urban farm land” in s. 2 provides by para. (c):

“Is not, in the opinion of the Council, Assessment Court, or Magistrate dealing with any application or objection under this Act, fit for subdivision for building purposes.”

This, coupled with the power in the latter subsection of s. 13, gives the Court in dealing with an appropriate objection, where it is of the opinion that the land concerned is fit for subdivision for building purposes, the right to determine that the land concerned is not urban farm land. In my opinion, this does not carry the matter any further than the power itself

under s. 13 does—namely, to determine that the land is not urban farm land. There still must be an objection related to that question which brings it directly in issue. If there is no such objection, it is not a thing “objected to,” and there is no power to alter the list.

I must hold, therefore, that, on the objections before the Court, I have no power to alter the list by erasing any matter therefrom.

Before proceeding to make the necessary alterations to the list in respect of the property of each objector, I desire to make a few general observations on the whole matter. Even if I had the power to determine, on the objections lodged, I am of the opinion that no such land is “fit for “subdivision for building purposes,” nor is it “likely . . . to be “required for building purposes within a period of five years” from this date, unless in the meantime such property be connected with the sewerage and drainage system of the borough. On this point I accept the evidence of Mr. Paterson and Mr. Roberts that no land is fit for subdivision for building purposes until a sewerage system is available for it. On the evidence, I am not satisfied that the Mosgiel Borough Council will be able to connect up the property of any of the objectors with the borough sewerage system within the next five years. If it can do so, then, the operation of s. 26 of the Act will become available to it.

Nor do I think that land is farm land within the meaning of para. (b) of the definition of “urban farm land” in s. 2, where the only income derived therefrom comes from the keeping of, for example, a domestic cow and a few poultry. This may augment the family income, but it is not using the land exclusively or principally for one of the prescribed farming purposes or for the keeping of poultry. For land comprising 3 acres or more, it is tantamount to the non-user of such land. To bring land within the section, it must be devoted to one or more of the farming purposes indicated—for example, a dairy farm, a poultry farm, the production of honey, the growing of tomatoes, strawberries, or vegetables in such quantities as would meet more than ordinary household requirements—and the person using such land for that purpose must derive the whole or a substantial part of his income therefrom.

[The learned Magistrate then proceeded to fix the special rateable values.]

Farm-land list altered accordingly.

Solicitors for Isabella Aitken and eighteen other objectors: *J. S. Sinclair and Stevenson* (Dunedin); *Cook, Allan, and Cook* (Dunedin).

Solicitors for J. C. and W. N. Muirhead, objectors: *Baylee and Brunton* (Dunedin).

Solicitors for the trustees of the estate of Thomas E. Wilkins, deceased, an objector: *Adams Bros.* (Dunedin)

Solicitors for the Mosgiel Borough Council: *Webb, Allan, Walker, and Anderson* (Dunedin).

[IN THE SUPREME COURT AND IN THE COURT OF APPEAL.]

DUNEDIN CITY CORPORATION AND ANOTHER v. HAMES.

SUPREME COURT. Dunedin. 1947. October 8; November 20. FLEMING, J.

COURT OF APPEAL. Wellington. 1948. March 16, 17; July 12. SIR HUMPHREY O'LEARY, C.J.; KENNEDY, J.; FINLAY, J.; GRESSON, J.

Rates and Rating—Systems of Rating—Annual Value—Hotel Premises—"Rateable value"—License and Goodwill not "rateable property"—Enhancement of Value by reason of Goodwill attaching to Premises—Valuer entitled to take Such Enhancement into Account—Rating Act, 1925, s. 2.

Where the system of rating on the annual value is in force, the local authority and its valuer are not entitled to assess the owner of licensed premises upon the principle that the publican's license in force in respect of those premises and the goodwill of the business carried on under such license, apart from their effect by way of enhancement, are included in the definition of the words "rateable property" in s. 2 of the Rating Act, 1925.

Toohy's, Ltd. v. Valuer-General(1), *In re Joseph*(2), and *In re Gilmer, Public Trustee v. Commissioner of Stamp Duties*(3) followed.

The words "such property" in the definition of "rateable value" in s. 2 of the Rating Act, 1925, refer to and mean "rateable property" as defined in s. 2, and no other class or type of property.

In re Joseph(4) and *In re Gilmer, Public Trustee v. Commissioner of Stamp Duties*(5) applied.

Where the system of rating on the annual value is in force, the local authority and its valuer are entitled to treat and envisage licensed premises as premises which will continue to be licensed, and to value them as they are, taking into account any enhancement in value due to the existence of a license and as premises to which a goodwill in respect of the business therein conducted attaches if, in fact, any such goodwill does attach; but no regard may be paid to any goodwill which is personal in character.

Dunedin City Corporation v. Young(6) referred to.

The judgment of *Fleming, J.*, *post*, p. 343, was affirmed on the first two points, but reversed on the third point, and the appeal therefrom was allowed.

(1) [1925] A.C. 439.

(2) (1905) 25 N.Z.L.R. 225.

(3) [1929] N.Z.L.R. 61.

(4) (1905) 25 N.Z.L.R. 225.

(5) [1929] N.Z.L.R. 61.

(6) [1941] 4 N.Z.L.G.R. 72.

ORIGINATING SUMMONS for the determination of questions arising under the Rating Act, 1925.

On January 14, 1926, one Buddicom became the registered proprietor of the land and buildings known as the Captain Cook Hotel in the City of Dunedin. The purchase price, which included the publican's license, was £20,000. On February 2, 1943, he leased the hotel for a term of

three years from that date at a rental of £26 per week. No separate payment was made for the use of the license or goodwill of the business. The lessee also covenanted to pay rates, taxes, charges, and assessments other than landlord's land tax. It was common ground that the lessee had the use of the license and goodwill. On July 14, 1944, Buddicom purchased a piece of land adjoining the hotel for £1,700. 5

On February 26, 1946, the plaintiff purchased both pieces of land from Buddicom for £27,500, which was apportioned, in the consent of the Land Sales Court, as follows :

Land and buildings	£4,900	10
Goodwill	£22,600	
	<hr/> £27,500 <hr/>	

The Government valuation of the first piece of land, comprising the hotel premises, made as at March 31, 1939, was :

Unimproved value	£750	15
Value of improvements	£3,500	
	<hr/> £4,250 <hr/>	

The defendant Corporation, on the annual value system of rating assessed the "rateable value" of the hotel property only at £1,040, for the year 1946/7 ; that is, after allowing the required deductions, at £20 per week. Other licensed premises in Dunedin were rated on a similar basis. The occupiers all lodged objections. One objection was taken as a test case before the Assessment Court, which upheld the valuation. The defendant Corporation had made assessments of the "rateable value" for the year 1947/8 on a similar basis, and twenty-nine objections, including that of plaintiff, had been lodged by the publicans concerned. These objections had not yet been dealt with. The grounds of these objections were, *inter alia* : 25

That in making the said assessments the said Corporation and its said valuer took into account in determining the rent at which the said properties would let from year to year the fact that a publican's license was in force in respect of each of them and treated and envisaged each property as an existing unit, that is to say premises in which the tenant would on obtaining a tenancy be entitled lawfully to carry on the business of a publican, without making allowance for the fact that of the so-called rent a tenant would be prepared to pay on such a basis, a very substantial part thereof would represent the consideration such tenant would be prepared to pay for the use of the publican's license in force in respect of the premises during the term of his tenancy. 30 35

The following questions were asked in the originating summons :

1. Whether the first-named defendant the above-named Corporation and/or the second-named defendant its valuer is entitled to assess the plaintiff under the Rating Act, 1925, as the owner and occupier of the said premises situate in the said City of Dunedin, the said City being a district wherein the system of rating property on its annual value is in force, and to fix the rateable value of the said premises upon the principle that the publican's license under the Licensing Act, 1908, held by 40 45

the plaintiff and in force in respect of the said premises and the goodwill of the business carried on under such license are included in the definition of the words "rateable property" contained in s. 2 of the Rating Act, 1925.

5 2. Whether the first-named defendant and/or its said valuer in assessing and fixing as aforesaid are to proceed upon the principle that the words "such property" in subs. 2 under the definition of "rateable value" in said s. 2 refer to and mean "rateable property" as defined by the said section and no other property.

10 3. Whether in assessing and fixing the rateable value of the said premises the first-named defendant and/or its said valuer is entitled

(a) To treat and envisage the said premises as an existing unit that is to say as licensed premises or an hotel in respect of which there is in force a publican's license under the Licensing Act which will be available to the tenant during the term of his tenancy ;
15 or

(b) To treat and envisage the said premises as premises in greater or less degree suitable depending on the situation thereof and the size and design of the buildings thereon for carrying on therein a publican's business subject to the tenant obtaining in respect thereof a publican's license under the Licensing Act, 1908.
20

4. Generally defining what principles are to be applied in determining the rateable value of the said premises.

25 *Neill*, for the plaintiff.
J. C. Robertson, for the defendants.

Cur. adv. vult.

FLEMING, J. [After stating the facts, as above :] The basis on which the rateable value of licensed premises, under the annual value system, should be determined is of great importance to publicans and rating
30 authorities of the Dominion. It should, therefore, be determined by this Court, or, preferably, by the Court of Appeal. The most eminent Judges in England have differed most profoundly in their interpretations of the various Rating Acts, over the last three hundred years, and in a
35 matter of such difficulty I cannot hope to do more than help to clarify the issues to be decided later by the Court above.

I propose to trace briefly the history of the Rating Acts of this country, and to note the differences between our system of rating and that of England, with reference to the point in issue.

40 Before the abolition of the Provinces, each Province had its own system of rating. The first Rating Act for the whole Colony, as it then was, was that of 1876. It was enacted to provide a uniform system of rating. Under it, rating was on the annual value system, and "rateable
"property" is defined as "all lands together with the improvements
45 "thereon." Certain lands were excepted. The "rateable value" of any property is defined as :

the rent at which such property would let from year to year, deducting therefrom twenty per centum in case of houses, buildings, and other perishable property, and ten per centum in case of land and other hereditaments, but shall in no case
50 be less than five per centum of the value of the fee-simple thereof : Provided always that in valuing the fee-simple the valuer shall be guided by the actual selling price.

In 1879, the Property Assessment Act was passed. It was a taxing Act and levied a tax on all property, both real and personal, within the

Colony—all such property “of which any person is the owner as shall exceed £500 in value.”

It is clear the Legislature was aware of the possibilities of a tax on personal property, and must have confined the Rating Act deliberately to “land and improvements thereon.”

The Rating Act, 1882, introduced rating on the capital value, based on the value of the fee simple (unencumbered) as assessed under the Property Assessment Act, 1879. It defines “rateable property” as “lands, tenements, or hereditaments with the buildings and improvements thereon.” It repealed the Act of 1876, but with a saving proviso that Boroughs should continue to rate under that Act (on the annual value) until they, by resolution, adopted the Act of 1882.

The Rating Act, 1894, was a consolidating Act, and preserved both the capital and the annual value systems of rating without any material alterations.

The Rating on Unimproved Value Act, 1896, introduced this third system of rating, which can be adopted by any rating authority if approved by a poll of the ratepayers.

The Rating Act, 1908, was similar to our present Act of 1925, under which all three systems of rating are retained. “Rateable property” is defined as “all lands, tenements, or hereditaments, with the buildings and improvements thereon.” Certain lands are excepted. “Rateable value,” under the annual value system, is defined as :

(a) In respect of property within any district where the system of rating property on its annual value is in force, means the rent at which such property would let from year to year, deducting therefrom twenty per centum in case of houses, buildings, and other perishable property, and ten per centum in case of land and other hereditaments, but shall in no case be less than five per centum of the value of the fee-simple thereof.

Section 8 (4) of the Rating Act, 1925, enacts the method of making the valuation list for the district in which the valuers are to set forth “the rateable value . . . of all rateable property in the district.”

Section 63 of the Finance Act, 1933 (No. 2), is as follows :

(1) The expressions “capital value,” “improvements,” “unimproved value,” and “value of improvements” as used in the Rating Act, 1925, shall have the meanings for the time being assigned to those expressions in the Valuation of Land Act, 1925.

Under the Valuation of Land Act, 1925, “land” is defined as :

all land, tenements, and hereditaments, whether corporeal or incorporeal, in New Zealand, and all chattel or other interests therein, and all trees growing or standing thereon.

This seems the widest meaning that could possibly be given to the term “land,” and it is in accordance with this definition that valuations are made by the Valuer-General under the Act. “Capital value” is defined as :

the sum which the owner's estate or interest therein, if unencumbered by any mortgage or other charge thereon, might be expected to realize at the time of valuation if offered for sale on such reasonable terms and conditions as a *bona fide* seller might be expected to require.

It seems clear that neither this extended definition of “land” nor the definition of “improvements” could possibly include the value of a publican's license or the goodwill of the business carried on under it. This has been decided in judgments to which I will refer later. The Valuation Department appears always to have made its valuations on this assumption. It also seems clear that, from the inception of rating in this country, only lands and interests therein were allowed by the Legislature to be rated. Nowhere is there (nor has there been) any

authority to rate personal property other than chattel interests in land. To make this principle still clearer, the present Act (1925) exempts from rating even machinery affixed to the land, which might, otherwise, in many cases, be deemed to be part of the land.

5 In the case of *In re Joseph*(1), *Cooper, J.*, decided that the license and goodwill of a licensed hotel is property liable to payment of estate duty, but is not to be considered in estimating either the unimproved value of the land or the value of the improvements thereon under the Valuation of Land Act.

10 The same view was taken by *Sim, J.*, in *In re Gilmer, Public Trustee v. Commissioner of Stamp Duties*(2). The learned Judge states: "The interest of the owner in the license and goodwill cannot be included in the unimproved value of the land as defined by the Act, and it is not an improvement within the meaning of the Act. The unimproved value
15 "of the land and the value of the improvements taken together make up the capital value of the land, and nothing can be included in the case of a licensed house as representing the value of the license. That appears to be the proper construction of the Act, and is the construction on which the Valuation Department has always acted"(3).

20 These decisions were approved unanimously by the Court of Appeal in *Heel v. O'Neill*(4). I cite from the judgment of *Reed, Ostler, and Smith, JJ.*, as follows: "The case of *The King v. Bradford* ((1815) 4 M. & S. 316; 105 E.R. 852), which was referred to in argument
" . . . does not touch the question which is to be decided here.

25 "An authoritative line of cases since that decision has established the position that the goodwill of a publican's business is not an interest in land and is to be legally regarded as separate from rent; and . . . there is nothing in the Act now being construed which can be held to show any intention on the part of the Legislature to widen the definition of rent so as to include sums paid for the goodwill of a business"(5).

30 Now, although this was a decision under s. 3 of the National Expenditure Adjustment Act, 1932, it is an authoritative decision on the meaning of "rent" of a licensed hotel. I adopt and modify the language used by the learned Judges, and say that there is nothing in the Rating Act, 1925,
35 nor in the history of rating in this country that extends the meaning of "rent" to include the license and goodwill of a publican's business.

In *Perpetual Trustees, Estate, and Agency Co. of New Zealand, Ltd. v. Wilson*(6), the question was again determined by the Court of Appeal. I cite from the headnote as follows:

40 A lease of land, "together with the buildings thereon known as the Crown Hotel," contained a provision for renewal, whereby valuations were to be made (a) "of all the buildings and improvements then on the land," and (b) "of the fair annual ground rent of the said land only without any buildings or improvements for a further term of twenty-one years"; and for the putting-up a lease
45 for such further term to public auction at the upset price of the annual value of the said land, as valued without buildings and improvements, &c. . . .

Held, . . . 1. That, unless in a case of this kind it appears from the terms of the lease that the hotel license has to be taken into consideration in fixing the fair annual ground rental, such rental must be based upon the land alone in its
50 fair or unimproved state.

"Rateable property" under the Rating Act, 1925, is expressly confined to "lands, tenements, or hereditaments, with the buildings and improvements thereon." The license and goodwill appertaining to it are neither hereditaments nor improvements, and there is no authority

(1) (1905) 25 N.Z.L.R. 225, 235.

(2) [1929] N.Z.L.R. 61.

(3) *Ibid.*, 63.

(4) [1933] N.Z.L.R. 319.

(5) *Ibid.*, 334.

(6) [1945] N.Z.L.R. 755.

in the Act to rate them. But that is precisely what the defendants appear to have done. The Land Sales Court fixed the value of both the hotel property and the adjoining section at £4,900. If we deduct the cost price of the adjoining section (£1,700), it leaves £3,200 as the value of the hotel apart from the license and goodwill. After deducting the statutory allowance of 20 per cent. for the buildings, &c., and 10 per cent. for the land, the valuer assessed the rateable value at £1,040. He must have assessed the gross rental at close on £1,300 per annum. Even if we take the Government valuation of £4,250, the assessment is extortionate. The valuer appears to have based it approximately on the rental of £26 per week formerly paid for both the licensed premises and the license and goodwill. This, in view of the authorities I have quoted, is quite wrong.

The defendants seek to justify this method of assessment by references to the English decisions. The whole history and incidence of rating in England differs from that in this country. It begins with the Poor Relief Act, 1601 (14 Eliz., c. 2) (*14 Halsbury's Complete Statutes of England*, 477). This was a tax on the inhabitants, and was not confined to land. The Act and subsequent amendments were vague and lacking in definition. The result is referred to in *Castle's Law of Rating*, 4th Ed. 6, as follows :

it will be seen that in most of the problems of rating there have been at least two views, often inconsistent with or contradictory of each other, taken by the Judges, and one or other of these views has been the one taken by particular Judges according to the circumstances of the case, or because they have already formed an opinion from other cases. Hence arises the difficulty in practice of having to reconcile decisions which are often irreconcilable.

It is to be noted that it was the "inhabitant, parson, vicar and other" who were to be taxed. If a person were not an inhabitant of a parish, even if he owned property therein, he escaped taxation. If an inhabitant, he was liable to taxation on both real and personal property, but, in time, only certain kinds of personal property were, in fact, rated. Thus *Ryde on Rating*, 8th Ed. 5, 6, states :

In *Reg. v. White*, (1792) 4 T.R. 771, it was regarded as settled law that personal property was rateable, and it was held that inhabitants of Poole were rateable for their ships trading from that port; that stock-in-trade was rateable, but that furniture, cash in hand (producing no interest), and money producing interest, but lent on the security of lands in other parishes, were not rateable.

In 1836, the Parochial Assessments Act (6 and 7 Will. 4, c. 96) (*14 Halsbury's Complete Statutes of England*, 501) was passed. It embodied the practice which had evolved of rating each occupier upon the value of his property as let on yearly lease, making a deduction for the repair and maintenance of the property.

In 1840, the Poor Rate Exemption Act (3 and 4 Vict., c. 89) (*14 Halsbury's Complete Statutes of England*, 504) was passed. It made it unlawful to tax any inhabitant on profits of stock-in-trade or other property other than lands, houses, tithes inappropriate, appropriations of tithes, coal-mines, or saleable underwoods.

Not until 1925 was any comprehensive attempt made to rationalize the law of rating. The Rating and Valuation Act, 1925 (15 & 16 Geo. 5, c. 90) (*14 Halsbury's Complete Statutes of England*, 617), provides for a uniform rate on the rateable value of each hereditament in the rating district. The method of ascertaining the rateable value is set out in s. 22 of the Act, but it is unnecessary to discuss it here. In this Act, "hereditament" is defined in s. 68 as :

any lands, tenements, hereditaments or property which are or may become liable to any rate.

The word "property" is not defined, but, bearing in mind the history of rating in England, under which personal property was liable to taxation under the original Act of 1601, the inclusion of this term may serve to explain any difference at present existing between the systems of rating on annual value in England and in this country.

It is unnecessary to refer to the numerous English cases cited during the argument, as the law in respect to the rating of licensed premises has been settled in that country by the decision of the House of Lords in *Robinson Bros. (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment Committee*(7). The White Lion Hotel at Houghton-le-Spring was assessed by the Assessment Committee at a gross rental of £112. On appeal to Quarter Sessions, this was reduced to £95, following the decision in *Bradford-on-Avon Assessment Committee v. White*(8), where it was held that the higher rent a brewer would be prepared to pay, to enable him to sublet to a tied tenant, should not be taken into consideration. This decision was affirmed on appeal to the High Court. On further appeal to the Court of Appeal, the decision of the High Court was reversed. The House of Lords, as before stated, affirmed the decision of the Court of Appeal. This decision is to the effect that the proper assessment of a public house should be at a figure which had regard to the competition of brewers, and to the increased rents which they might offer. Lord Macmillan (with whom the other Law Lords concurred) in the course of his speech used certain words which I think the defendants have misconstrued. For instance, he states: "Nor, in taking into account the rent which a brewer would pay, is there any violation of the principle that the valuation must be *rebus sic stantibus*. It is precisely because the hereditament is a public house, and is to continue to be used as such, that it attracts 'the brewers' competition'"(9). This cannot mean that the license must necessarily go with the licensed premises and be valued as if appurtenant to the land. The difference in the gross value, with and without the assumed competition of the brewers, was only £17 per annum. The low rents indicate that the value of the license and goodwill could not have been valued as part of the hereditament. His Lordship continues: "The case is just the same as that of any manufacturer who rents shops for 'the retail sale of his goods'"(10). With great respect, I think there is a difference. If the manufacturer outbids a present tenant, the latter has to leave, and the manufacturer can open his own business without hindrance. But a new tenant of licensed premises, be he brewer or not, must also purchase or obtain a publican's license before he can use the premises. The question arises: Is the excess rent he is prepared to pay not in fact an indirect payment for the license? I think this thought must have occurred to His Lordship, for he continues as follows: "While, therefore, evidence as to the rents which brewers would be prepared to pay for the tenancy of a public house, whether they propose to sublet it to a tied tenant or to occupy it themselves through a manager, is in my opinion both competent and relevant in estimating the rent which a hypothetical tenant of the public house might reasonably be expected to pay, it by no means follows that the rent which could be obtained from a brewer is necessarily to be taken as the gross annual value. There may not be many brewers in the district looking out for public houses to let, and the chance which a public house in the particular locality has of being let to a brewer willing to pay a high rent may be small. It is

(7) [1938] 2 All E.R. 79; affg. [1937] (9) [1938] 2 All E.R. 79, 86.

2 All E.R. 298.

(10) *Ibid.*, 86.

(8) [1898] 2 Q.B. 630.

"for the valuing authority to arrive at their valuation on the whole evidence, including evidence as to the extent of the demand for public houses in the district, the parties likely to compete for them, whether brewers or others, the rents which these competitors of all classes would be likely to offer, and all other relevant considerations. In the present stated case, it will be noted that the figure of £112 is not said to be the rent which a brewer would be willing to pay for the White Lion Hotel, but that the rent at which the hereditament might reasonably be expected to let from year to year would be sufficiently high to support a gross value of £112, if regard be had to the competition between brewers and to the rent which a competing brewer, who desired the premises in order to secure the use of them for the sale of beer from his own brewery, might be willing to give" (11). 5 10

Some of the dicta of *Scott, L.J.*, in the same case in the Court of Appeal have, in my opinion, been too widely construed by the defendants. Thus he states: "Whilst the tenant is hypothetical . . . the hereditament is actual, namely, the hereditament described in the valuation list with all its actualities . . . That is why, in valuing a public house, you must take into account its license, with the statutory implications of the license, as, for instance, on the one hand, its monopoly value, and, on the other, the degree to which in that area the competition of other licensed houses may reduce the profit-making quality of that particular house, and so prejudice the demand for it" (12). 15 20

Now, taking into account the license does not mean assessing the license for rating purposes. What he means, in my opinion, is this. Here is a house suitable for use as a licensed house. It has been approved for that purpose by the Licensing Authority. It will, therefore, be in demand by prospective tenants unless that demand is reduced by undue competition of other licensed houses in the vicinity. He cannot mean that the license is to be assessed, for he says: "The hereditament to be valued under s. 22 of the Act is always the actual house or other property for the occupation of which the occupier is to be rated, and that hereditament is to be valued as it in fact is—*rebus sic stantibus*" (13). 25 30

We have seen from the New Zealand decisions I have cited that the license and goodwill of a license are not a part of the hereditament. This is also recognized in England. In the case of *Cox v. Harper* (14), a public house had been let at a rental of £150 per annum for the premises, and £1,250 per annum in lieu of premium for the goodwill. A creditor levied execution against the tenant, and the landlord claimed one year's arrears of rent, in which he included both yearly sums. It was held by the Court of Appeal that the sum paid for the goodwill was not rent within the meaning of the Landlord and Tenant Act, 1709, s. 1. This section provides that a sheriff under an execution must pay to the landlord of any demised premises on which goods are seized : 35 40

all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution. Provided the said arrears of rent do not amount to more than one year's rent. 45

Here, a clear distinction is recognized between rent of the premises and a payment of goodwill.

The English decision referred to may possibly be followed here to this extent—that the premises (only) are to be valued *rebus sic stantibus*. In this event, the case of *Duncan v. Mackie* (15) would be of assistance. 50

(11) [1938] 2 All E.R. 79, 86.

(12) [1937] 2 All E.R. 298, 311.

(13) *Ibid.*, 307.

(14) [1910] 1 Ch. 480.

(15) [1940] G.L.R. 226.

There, a property was leased for a term of sixty years. The rental for the first ten years was £100 per year. For each succeeding term of ten years the rent was to be fixed by arbitration on the value of the "land and appurtenances as a site for an hotel . . . excluding from

5 "consideration any buildings." The Court of Appeal held:

That the arbitrators or umpire are to estimate the ground rent upon the basis of the unimproved value of the land as enhanced by the mere existence of the license, excluding from their consideration the buildings, &c., upon the land, and not taking into consideration the goodwill of the hotel business actually carried on or the trade actually done on the premises in the past.

10 In the case just cited, the lease itself required the land to be valued "as a site for an hotel." If, under the Rating Act, the "lands tenements or hereditaments together with the buildings and improvements thereon" are to be assessed as they stand, and as they are being used, then any added
15 value from the mere existence of the license may be taken into account. I doubt the correctness of this doctrine, because a large house, in a business area, might be used as a residence by one or two people with most of its rooms closed up, although it would be suitable for a boarding-house, nursing-home, or rooms for medical practitioners. In my opinion, the
20 premises should be assessed for any legitimate purposes for which they are suitable and for which there would be a demand. In any event, the valuer must bear in mind that the hypothetical tenant, in addition to the rent he will pay for the licensed premises, will have to pay to the owner of the license its full value, either by purchasing it or obtaining its use for a
25 term. The valuer will have to consider whether or not a tenant who has already paid full value for the use of the license and goodwill, will duplicate the payment by paying an excessive rental.

It is the purpose for which land is used, or is suitable, that fixes its value as sites for buildings. In streets used for large retail businesses, the
30 land will be more valuable than land in streets used for residential purposes. Sometimes the opening of a large retail business in a street enhances the value of all the land in its vicinity. It increases the pedestrian count; that is, the number of people using the street, and, therefore, the number of potential customers. Similarly, the opening of a first-class hotel may
35 enhance land values in its vicinity by bringing there guests more or less affluent, from other parts. An ill-conducted or inferior hotel, on the other hand, could be a positive detriment to its locality.

Counsel for defendants refers me to the decision of the Land Sales Court delivered by *Finlay, J.*, in *In re Oriental Hotel, Muir to Niall* (16).
40 This was a decision under the Servicemen's Settlement and Land Sales Act, 1943. The Court held that, where the license and goodwill of an hotel as well as the licensed premises were sold to the same purchaser, and separate prices allotted to each, the Court had power to consider the whole transaction, and, if the total price were not excessive, to consent to
45 the sale of the land. In effect, the Court refused to penalize a vendor if he failed to make a correct mathematical apportionment of the respective values, first, of the license and goodwill, and, secondly, of the licensed premises. In the course of his judgment, the learned Judge stated: "Under the law of New Zealand . . . licenses granted under the
50 "Licensing Act, 1908, and its amendments, and the goodwills of businesses "conducted pursuant to such licenses are not land and do not constitute "legal or equitable interests in land" (17). His Honour then proceeds to consider whether or not there is: "[an] additional value assessed by
"reason of the fact, that the land and buildings, regarded as a whole, are
55 "licensed premises, that the buildings are specially adapted for a publican's
(16) [1944] N.Z.L.R. 512. (17) *Ibid.*, 514.

"business (as to which see *In re Lucas and Chesterfield Gas and Water Board* ([1909] 1 K.B. 16)), and that on those premises is centred "and has for some considerable time been centred a prosperous publican's "business"(18). After reviewing certain English authorities, he finds that these facts do add an additional value to the land and buildings. 5

In re Lucas and Chesterfield Gas and Water Board(19) was a case of compensation for land taken compulsorily, and under the statute, "special "adaptability" had to be allowed for. There is no doubt that "special "adaptability" enhances the value and annual value of any property.

I do not propose to review the numerous English decisions cited by 10 *Finlay, J.*, in the *Oriental Hotel* case(20). They certainly provide authority for the proposition that part of the goodwill of a licensed house, in actual fact, if not in law, attaches to, and enhances, the value of the licensed premises. There was a time in England when the owner of any suitable premises could obtain a license for them. If this were so to-day, 15 it would be easier to follow the decisions. It is certainly not so in New Zealand, where the number of licenses cannot be increased. The owner of a license, therefore, is in a privileged position. He can protect himself from being fleeced by a too greedy landlord. Usually the license and the premises are sold and purchased, or disposed of, together. To prevent 20 confusion of thought, the licensed premises should be considered as belonging to a landlord, and the license and goodwill to the tenant. The tenant, owning a valuable property in the license and goodwill, will protect himself by a carefully-drawn lease, even if only from year to year, safeguarding his license and his right to apply for a removal of it at the 25 end of the term. To whom then does the goodwill belong? I consider our Court of Appeal has answered this question in *Duncan v. Mackie*(21). There, where the lease required the existence of the license to be taken into account in fixing the rental, it was held, as before stated, that the arbitrators or umpire must not take into consideration "the goodwill of 30 "the hotel . . . business . . . or the trade actually done on the premises "in the past"(22). They were to consider only "the ground rent . . . "of the land as enhanced by the mere existence of a license"(23). How, in practice, is a valuer to apply this decision? I adopt the principle of *Rebus sic stantibus* from the English decisions, but qualify it by adding 35 that the valuer may also consider any legitimate purpose for which the premises are suitable, and for which there would be a demand. He may, therefore, take into consideration the suitability of the premises for the business of a publican, and the fact that they have been approved by the Licensing Authority for the purpose. He will estimate the rental which 40 a hypothetical tenant would be prepared to pay on a tenancy from year to year, with the expectation that it will continue for more than a year, but is liable to be terminated at the will of the landlord by notice; and on the other considerations set out in the judgment of the Court of Appeal in *Dunedin City Corporation v. Young*(24). He will take into con- 45 sideration probable competitors of all kinds, but will also consider how this competition may be excluded or reduced by the fact that the present tenant is the owner of the license. Even where the landlord owns the license, the valuer must remember that a prospective tenant will have to buy the license and goodwill attaching to it at their full value. Where 50

(18) (1944) N.Z.L.R. 512, 515.

(19) [1909] 1 K.B. 16.

(20) [1944] N.Z.L.R. 512, 515, 516, 517, 518, 519, 520, 521.

(21) [1940] G.L.R. 226.

(22) *Ibid.*, 231.

(23) *Ibid.*, 231.

(24) (1941) 4 N.Z.L.G.R. 72.

there is a law in existence restraining or prohibiting aggregation of land, he will consider the effect of that in eliminating the competition of monopolistic concerns, such as brewing companies. Where there is a law for the fixing of fair rents for business premises, that, too, must be considered. He must on no account include any part of the value of the license and goodwill in his assessment. Any value added to the premises by the mere existence of the license is indirect, and similar in effect to the value added to land, by the existence thereon of any class of retail business, where there is a vigorous public demand for the goods retailed. The valuer should bear in mind that this indirect added value is less in the case of licensed premises than in that of other businesses not restricted in number; because, as before stated, the tenant of, say, a drapery shop, if he will not pay the rent demanded for a renewal of his lease, must vacate the premises, and the landlord can let the premises to another draper, who does not require any license, and who can, therefore, get the benefit of a considerable part of the goodwill which, in this case, attaches to the premises. On the other hand, when the tenant of licensed premises quits, and obtains a removal of his license, he takes the goodwill with him. The premises vacated are no longer licensed, and no new license can be granted for them. This disability of licensed premises is compensated for by what may be called the competition of sites. I introduce this new element into an already complicated system with some trepidation, but I consider it important. A license, by virtue of the Licensing Act, may not be removed for a greater distance than half a mile. The number of suitable premises, or sites, within the radius may be limited, and a tenant of licensed premises may be prepared to pay a higher rent than a fair rent for a renewal of his lease, rather than incur the trouble and expense of a removal. He will not allow himself to be fleeced indefinitely, but at the first opportunity will lease, buy, or build other premises. He is, therefore, in a position to "higgle" with his landlord, and to keep the rent down to a reasonable amount.

For these reasons, in my opinion, the rateable value of licensed premises should bear a close relationship to that of comparable land and buildings (not being licensed premises) in its vicinity.

The effect of s. 129 of the Licensing Act, 1908, was not argued before me, but it should be considered. It prohibits a Licensing Committee from consenting to the removal of a license:

unless it is satisfied that no objection to such removal is made by the owner of the premises to which the license is attached.

The English Act is similar. In both countries, the owner of the premises usually owns the license also. But there are exceptions. Does this section mean to give absolute control to a landlord over his tenant's license? I think this was not intended by the Legislature. It would amount to a partial confiscation of a tenant's license and goodwill, in favour of the landlord. This would be at variance with the spirit of our laws and system of jurisprudence. It would also be in conflict with the decisions of our Court of Appeal which I have cited. It is true that both here and in England a way has been found by the Courts to protect the tenant in such cases: see *Lacey v. E. Lacey and Co., Ltd.*, and *Thornton*(25) and *Ex parte Gaukrodger, In re O'Driscoll's Application*(26).

It is clear that this section of the Licensing Act could work an injustice, and should be amended. In practice, a prudent tenant would protect

(25) [1899] A.C. 222.

(26) (1901) 20 N.Z.L.R. 660.

himself by the terms of the lease. In none of the English cases is the similar provision of the English Act given as the basis for the decisions.

I therefore answer the questions submitted as follows :—

Question 1.—No.

Question 2.—Yes.

Questions 3 and 4.—A valuer should assess licensed premises in respect of which a publican's license is in force, as follows :—

- (a) He will assess the land and buildings only as they stand, with all their advantages and disadvantages, for the purposes of a publican's business, or of any other business, or purpose, for which there is a probable demand, including the fact that the premises have been approved by the Licensing Authority as licensed premises. 10
- (b) He must not include the license or goodwill which accompanies the license, as adhering to the licensed premises in whole or in part. 15
- (c) He will take into consideration the increment in the value of the land (in common with that of other land in the vicinity) by reason of its suitability for a site for a retail or other profitable business. 20
- (d) He will take into consideration all probable competition from hypothetical tenants, and also the improbability of competition where the tenant or occupier owns the license.
- (e) Where the landlord owns the license, the valuer will take into consideration that any prospective tenant will have to purchase the license, or the use of it, at full value, and that any apparently excessive rental for the licensed premises may be an indirect payment for the license and goodwill adhering thereto. 25
- (f) He will consider whether or not the lower rent payable by a brewer's tenant, who is bound to purchase his beer, &c., from his landlord, is not in fact too low for the licensed premises, and, similarly, whether or not the higher rent is not a penal one. 30
- (g) He may take into consideration the availability, or otherwise, of other sites within a radius of half a mile, suitable or adaptable for use as licensed premises, or for the erection of suitable buildings for licensed premises thereon. 35
- (h) He will also take into consideration any legislation or law restraining the aggregation of land, and therefore restricting competition ; or making provision for the fixing of a fair rent for business premises. 40
- (i) With these and any other relevant considerations in mind, he will fix the assessable value in the manner laid down in *Dunedin City Corporation v. Young* (27). 45

The defendant Corporation will pay the plaintiff's costs, which I fix at £31 10s. and disbursements to be fixed by the Registrar.

From the whole of the declaratory order made in pursuance of the foregoing judgment, the defendants appealed, upon the ground that it was erroneous in point of law. 50

In the Court of Appeal,

(27) [1941] 4 N.Z.L.G.R. 72.

A. N. Haggitt and J. C. Robertson, for the appellant Corporation.
Meade, for the respondent.

Haggitt, for the appellant Corporation. The real issue is the method to be adopted in making valuations of licensed premises in the cities of Auckland, Lower Hutt, Dunedin, and Nelson, in which the system of rating property on the annual value is in force. The learned Judge lays down a method of valuation with variations on the practice generally adopted(1). The question is whether the judgment given in the previous year by the Judge of the Assessment Court(2) or the judgment in the Court below(3) is correct. The question in issue is set out in the former judgment(4).

The City Valuer must take into account the fact that he is valuing an hotel property. It is his duty in assessing the rateable value to take as his basis the gross annual rental, as indicated in *Dunedin City Corporation v. Young*(5). The assessment must be taken on the assumption that, in respect of his occupation of the premises, the tenant will not have to pay anyone anything more than his rent. The City Valuer has never valued the goodwill or the license as such, but only the enhanced value accruing to the land by the existence of a hotelkeeper's license. The hotel property is rated as a unit. A license is issued to a person to sell liquor in specified premises. In none of the English cases did the decision turn on the license or goodwill being assessed as such: only that can be assessed which is capable of being "rateable property" as that term is defined in s. 2 of the Rating Act, 1925. Rating on the annual value is regulated by a code complete in itself. The inquiry in every case is as to the rental value of the rateable property.

The land and buildings are actual, but the person to rent them is a hypothetical tenant. A continuance of the existing rent is assumed; and the purpose for which the premises are used is a factor in determining the rent so paid: 27 *Halsbury's Laws of England*, 2nd Ed. 389, 390. The actual rent is no criterion, unless it be what the hypothetical tenant could be expected to pay: *Poplar Assessment Committee v. Roberts*(6). All possible tenants, including the present tenant, and the landlord must be considered: *Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee*(7); and as to the valuation of licensed property, see 27 *Halsbury's Laws of England*, 2nd Ed. 425. The rateable value of the property in issue here, assessed as an hotel and bottle-store, on the annual value of £1,040 is equivalent to a rental value of £25 per week less the statutory deduction of one-fifth. The estimate of purchase value of the fee simple is a minimum of £20,800, and the rateable value may not be less than 5 per cent. of that amount (£1,040). The respondent purchased in 1946 for £25,800, and at 5 per cent. on that sum the rateable value is £1,290 (including the license and goodwill). The valuer has valued it for rating purposes on a low value, and less than the Government value. Regard must be had to the purpose for which the property is being used for the particular year: the principle of *rebus sic stantibus*.

This Court is concerned only with the annual value. The difference in principle between the relative English statutes and the Rating Act, 1925, is explained in *Dunedin City Corporation v. Young*(8).

(1) *Ante*, p. 351, l. 28, p. 967, ll. 2, 12.

(2) *Ante*, p. 342, l. 24.

(3) *Ante*, p. 343.

(4) *Ante*, p. 342, l. 24.

(5) [1941] 4 N.Z.L.G.R. 72.

(6) [1922] 2 A.C. 93, 103, 116, 120, 121.

(7) [1937] A.C. 419, 436, 437; [1937]

1 All E.R. 11, 19, 20.

(8) [1941] 4 N.Z.L.G.R. 72, 80.

The license must be taken into account in New Zealand, as in England, and the valuer's duty is to ascertain the value of the land and of the buildings thereon as an existing unit. Anything that affects or enhances the value of the unit must be taken into account by the valuer; and, as the buildings are licensed buildings, they must be valued as such.

There is no material difference in the definition of "rateable value" in the New Zealand statute and the words "net annual value" in the English Acts of 1869 and 1925, and no difference between the words "rateable property" in the New Zealand statute and the word "hereditament" in those English statutes, and, in particular, the words "or property" in the English Act of 1925 constitute in themselves no line of demarcation sufficient to justify the rejection of the principles laid down in *Cartwright v. Sculcoates Union*(9) and *Robinson Bros. (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment Committee*(10) and other English cases, as His Honour suggested(11).

The value of the fee simple, for the purpose of assessing the minimum rateable value, means the market value of the unencumbered fee simple, including the existence of the license and the element of goodwill in respect of it; and the market value is enhanced by the existence of the license and goodwill, just as the rateable value is affected and enhanced by those same factors. The existence of the license must be taken into account: *Ryde on Rating*, 6th Ed. 648, 657, 661, referring to *The King v. Bradford*(12) and *Cartwright v. Sculcoates Union*(13). All consideration tending to affect the hereditament must be taken into account: *Robinson Bros. (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment Committee*(14), where valuable observations as to the method of valuing licensed premises are to be found(15); and see *Inland Revenue Commissioners v. Earl Fitzwilliam*(16). The effect of the goodwill on the value of the property must be taken into account. The doctrine of *rebus sic stantibus* was referred to by the learned Judge in the Court below(17), and, in so far as he does not apply that doctrine, his judgment is wrong. The property must be taken as it is on January 15, in the rating year, and valued *rebus sic stantibus*, but that doctrine is so qualified by His Honour(18) as to destroy its application. The learned Judge considered himself constrained(19) by *In re Joseph*(20), *In re Gilmer, Public Trustee v. Commissioner of Stamp Duties*(21), and *Heel v. O'Neill*(22), which were cases under the Valuation of Land Act, 1925, based on the definitions of "capital value" and "valuation of improvements." They have no relevance whatsoever, because, here, it is the annual or rental value that has to be determined, as the basis of rating is the annual value. In *In re Gilmer, Public Trustee v. Commissioner of Stamp Duties*(23), it was held that the unimproved value plus the value of the improvements constitute the capital value; but the system of valuing on the annual value is a code in itself, having no relation to the Valuation of Land Act, 1925. The emphasis is on the "rateable value," and anything which enhances the value of the land and buildings must be taken into account; and the valuer must

(9) [1899] 1 Q.B. 667; aff. on app.,

[1900] A.C. 150.

(10) [1938] 2 All E.R. 79.

(11) *Ante*, p. 347, l. 1.

(12) (1815) 4 M. & S. 317; 105 E.R. 852.

(13) [1899] 1 Q.B. 667, 670, 673; [1900] A.C. 150, 153, 155, 160, 161.

(14) [1938] 2 All E.R. 79, 84, 85, 86.

(15) *Ibid.*, 84, 85, 86.

(16) [1913] 2 K.B. 593, 597.

(17) *Ante*, p. 347, ll. 24, 28, p. 969, ll. 24, 50, p. 349, l. 12, p. 972, l. 5.

(18) *Ante*, p. 350, l. 34.

(19) *Ante*, p. 345, l. 5.

(20) (1905) 25 N.Z.L.R. 225.

(21) [1929] N.Z.L.R. 61.

(22) [1933] N.Z.L.R. 319.

(23) [1929] N.Z.L.R. 61.

accordingly have regard to the existence of the license and the likely volume of trade. The words "capital value" as used in *In re Gilmer, Public Trustee v. Commissioner of Stamp Duties*(24) do not mean the same thing as the value of the fee simple: see the definition of "rateable" 5 "value" in s. 2 of the Rating Act, 1925. Under the system of rating on the annual value, the Government Valuation Roll is disregarded: the inquiry is to reach a result on which rates only are to be assessed. No other form of taxation is affected.

Section 8 (4) of the Valuation of Land Act, 1925, regulates the valuation 10 of land on the basis of the annual value; and s. 33 provides for the annual valuation list after approval by the Judge of the Assessment Court. This is similar in effect to the English legislation.

The inquiry under the Rating Act, 1925, is confined to rates: the property to be rated is land plus buildings, with all the advantages and 15 disadvantages which affect their rental value: *In re Oriental Hotel, Muir to Niall*(25); and, for the reasons there given, this case is distinguishable from *In re Joseph*(26), *Heel v. O'Neill*(27), and *Cox v. Harper*(28); and see *Ryde on Rating*, 8th Ed. 677. In *Duncan v. Mackie*(29) and 20 *Wilson*(30), the whole question turned on the terms of the particular lease; here, there is an entity consisting of an hotel, and it must be valued *rebus sic stantibus*.

Under the statute, as interpreted in England in respect of corresponding sections, the license enhances the value of the land and buildings, and 25 must be taken into account by the valuer. The value of the fee simple, for the purpose of rating on annual value, is the annual value capitalized: *Inland Revenue Commissioners v. Earl Fitzwilliam* (31), *Ashby's Cobham Brewery Co., Petitioners, In re The Crown, Cobham*(32), and *Toohey's, Ltd. v. Valuer-General*(33). The total value of an hotel premises consists 30 of the combined value of three elements: *Toohey's, Ltd. v. Valuer-General*; and those characteristics are enumerated in *The King v. Shoreditch Assessment Committee, Ex parte Morgan*(34), *Perpetual Trustees, Estate, and Agency Co. of New Zealand, Ltd. v. Wilson*(35), and *Duncan v. Mackie*(36). These authorities demonstrate that the license and goodwill 35 must be taken into account as enhancing the value of the property; and for those reasons the judgment(37) is wrong in that the learned Judge assumes that the valuer has valued the license and the goodwill(38).

As to goodwill, the statement in *Ryde on Rating*, 8th Ed. 672, is adopted, and see, in *Duncan v. Mackie*(39), the reference to "an ordinarily efficient 40 "hotelkeeper."

Robertson, in support. The English and New Zealand rating systems have in common that the ground of liability for a rate is rateable occupation. In New Zealand, the subject-matter of the occupation is defined 45 in s. 2 of the Rating Act, 1925, as "rateable property." In England, the term used is "hereditament": Rating and Valuation Act, 1925

(24) [1929] N.Z.L.R. 61.

(25) [1944] N.Z.L.R. 512, 514.

(26) (1905) 25 N.Z.L.R. 225.

(27) [1933] N.Z.L.R. 319.

(28) [1910] 1 Ch. 480.

(29) [1940] G.L.R. 226, 229.

(30) [1945] N.Z.L.R. 755, 759.

(31) [1913] 1 K.B. 184, 189; aff. on app., [1913] 2 K.B. 593, 397; aff. on app., [1914] A.C. 753, 759, 763.

(32) [1906] 2 K.B. 754, 761, 762.

(33) [1925] A.C. 439.

(34) [1910] 2 K.B. 859, 876.

(35) [1945] N.Z.L.R. 755, 766.

(36) [1940] G.L.R. 226.

(37) *Ante*, p. 351, l. 32.

(38) *Ante*, p. 345, l. 53.

(39) [1940] G.L.R. 226, 234.

(14 *Halsbury's Complete Statutes of England*, 617), ss. 20, 68 : *Ryde on Rating*, 8th Ed. 1108, 1127. The inquiry both in England and in New Zealand under the system of rating on annual value is as to value (rental value). In New Zealand, the amount of the rate depends on the "rateable value" of "rateable property." In England, the position is similar : see s. 22 of the Rating and Valuation Act, 1925, and *Ryde on Rating*, 8th Ed. 1108, as to "net annual value" and "rateable value." The only distinction is that the deduction from gross value to net annual value is measured in New Zealand by an arbitrary percentage : *Dunedin City Corporation v. Young*(40). In some of the earlier English Acts, the words "rateable property" are actually used : see *Ryde on Rating*, 8th Ed. 1030. The English Acts, which commenced with the Poor Relief Act, 1601 (43 Eliz., c. 12) (14 *Halsbury's Complete Statutes of England*, 477), still apply, and also the decisions thereon : *Ryde on Rating*, 8th Ed. 219-221, 225, 226. The only real difference between "hereditament" as defined in the Rating and Valuation Act, 1925 (Eng.), and "rateable property" as defined in s. 2 of the Rating Act, 1925 (N.Z.), is the addition of the words "or property" to which reference is made in the judgment of the Court below(41). (For the reason for the inclusion of those words in the definition of "hereditament," it is necessary to go back to the Act of 1601, under which personal property was rateable. In 1840, rating on personal property ceased, but in 1874 a special Act brought in a system of rating with reference to sporting rights, which were held to be an incorporeal hereditament, so that it became necessary to retain the words "or property." *Cartwright's case*(42) and *Robinson's case*(43) were not decided on the basis that a license was "property," and rateable as such : such a license is not "land" or a "tenement" or a "hereditament," because it is personal, and renewable annually. Payments are not "land, tenements, or hereditaments," and are, therefore, "property" : see *The Queen v. Christopher-son*(44), cited in *Ryde on Rating*, 8th Ed. 637, 638, 639. Tolls, as incorporeal property, are not *per se* rateable, but the principle emerges that, if they arise out of the land, they are taken into account in estimating the net annual value of the land. In New Zealand, the land and buildings are rated ; and *Robinson's case* (45) is directly applicable here : *The Queen v. North and South Shields Ferry Co.*(46) and *Ryde on Rating*, 8th Ed. 482. The license must be taken into account because it is an element or condition that enhances the value of the "rateable property" : *Waddle v. Sunderland Union*(47) and *Appenrodt v. Central Middlesex Assessment Committee* (48) ; and see *Ryde on Rating*, 8th Ed. 243-245, 259-264, as to the actual conditions affecting the hereditament at the time the valuation is made. The English cases unaffected by the words "or property" in estimating the annual value of licensed premises are *West Middlesex Waterworks Co. v. Coleman*(49) and *Allison v. Monkwearmouth Shore Overseers*(50) ; and see the Irish case, *Armstrong v. Commissioner of Valuation in Ireland*(51), which, as it applies the principles of the English decisions, is directly in point here, and is entirely

(40) [1941] N.Z.L.G.R. 72.

(41) *Ante*, p. 347, l. 1.

(42) [1899] 1 Q.B. 667 ; aff. on app., [1900] A.C. 150.

(43) [1938] 2 All E.R. 321.

(44) (1885) 16 Q.B.D. 7.

(45) [1938] 2 All E.R. 321.

(46) (1852) 1 El. & Bl. 140 ; 118 E.R. 390.

(47) [1908] 1 K.B. 642, 649, 653.

(48) [1937] 2 K.B. 48, 55, 56, 61, 75 ; [1937] 2 All E.R. 325, 328, 329, 330, 333, 342, 343.

(49) (1885) 14 Q.B.D. 529.

(50) (1854) 4 El. & Bl. 13, 22 ; 119 E.R. 6, 10.

(51) [1905] 2 I.R. 448, 471.

against the respondent's contentions. As to the position in England generally, see 14 *Halsbury's Complete Statutes of England*, 445 *et seq.*

Meade, for the respondent. The term "such property" in the definition of "rateable value" in s. 2 of the Rating Act, 1925, means
5 "rateable property." The appellant does not contend that the license as such (including goodwill) is rateable property, but says that its value is to be added by way of enhancement. A licensed house consists of three elements: the land, the buildings, and the license: see *Toohy's, Ltd. v. Valuer-General*(52). Here, the question is whether, for rating
10 purposes, these three elements are to be added together and taken as an existing unit. If the license is brought in by way of enhancement, then the same result is achieved as if the license were "rateable property." The English decisions show that the Courts have viewed the matter in the light of an existing unit, treated as the totality of all three elements.
15 The Courts in New Zealand are not entitled to adopt those decisions, owing to the effect of different statutory provisions, which prevent the value of the license being taken into account. Rateable value is the amount for which the land and buildings can be let from year to year. The expression "capital value" is defined in the same terms in both the
20 Rating Act, 1925, and the Valuation of Land Act, 1925. In New Zealand, the only authority to rate is contained in the Rating Act, 1925, and decisions based on other statutes are of doubtful assistance: see *Rousou v. Photi* (*Gort Estate Co., Third Party*)(53). This case is to be determined within the principles enunciated in *In re Joseph*(54), in which the definition
25 of "rateable property" was practically the same as the definition in the Rating Act, 1925. *In re Joseph*(55) was followed in *In re Gilmer, Public Trustee v. Commissioner of Stamp Duties*(56), and both decisions were approved in *Heel v. O'Neill*(57), where it was decided that moneys paid for goodwill cannot be considered as rent paid in respect of land and
30 buildings, and, accordingly, goodwill is severable from the land and buildings. If the principle of enhancement applies, then there must be established some nexus between the license and the land and buildings: *Cox v. Harper*(58).

In each case, the question of enhancement depends upon the constating
35 authority. (In *Cox v. Harper*(59), it was the agreement of the parties.) Upon that principle, the *Oriental Hotel* case(60) was determined. As far as the rating cases in England are concerned, one must look to the constating authorities upon which they are founded. It was stated in the *Oriental Hotel* case(61) that rent fundamentally is something
40 paid for the use of land with the buildings on it, and that covers the definition of "rateable value" in the Rating Act, 1925; but, in that case, the Court, in finding that the license enhanced the value of the land and buildings, based its decision on the contract of the parties(62). If the parties had sold the land and buildings without the license, the position
45 might have been different. In *West London Syndicate, Ltd. v. Inland Revenue Commissioners*(63), it was held that the goodwill was "property" other than land. The definition of "rateable property" is not to be expanded by adding some such words as "as an existing unit" or "as a
"going concern." The statutory foundation for rating in England was

(52) [1925] A.C. 439.

(53) [1940] 2 All E.R. 528.

(54) (1905) 25 N.Z.L.R. 225, 228, 234.

(55) (1905) 25 N.Z.L.R. 225.

(56) [1929] N.Z.L.R. 61.

(57) [1933] N.Z.L.R. 319, 330.

(58) [1910] 1 Ch. 480.

(59) [1910] 1 Ch. 480.

(60) [1944] N.Z.L.R. 512.

(61) [1944] N.Z.L.R. 512, 514.

(62) *Ibid.*, 518.

(63) [1898] 2 Q.B. 507, 508, 513, 523.

the Poor Relief Act, 1601, and this was followed by differing English statutes: 14 *Halsbury's Complete Statutes of England*, 455 *et seq.*, and see *The King v. Bradford*(64), *The Queen v. Lumsdaine*(65), and *Ryde on Rating*, 8th Ed. 5, 6. The English authorities on which the appellant relies are not applicable in New Zealand, where, from the very inception 5 of rating (the Rating Act, 1873), the definition of "rateable land" in s. 37 meant all land together with the buildings and improvements thereon. Section 2 of the Rating Act, 1925, adopts the same test, and provides that the annual value shall not be less than 5 per cent. of the fee simple. The Otago Provincial Ordinance, 1865, shows that 10 the position in England was not applicable to the Province of Otago: see the Property Assessment Act, 1879, and the Rating on Unimproved Value Act, 1896, s. 2. In England, certain classes of personal property (notably, machinery) are taken into account in fixing the value of a hereditament. The difficulty with regard to the English cases disappears if 15 it be conceded that, from the beginning, in each particular case the test has been, under the constating authority, the idea of an existing unit, and that the authorities cited, English and otherwise, are decided by reference to the constating authority in each particular case: see *Ashby's Cobham Brewery Co., Petitioners, In re The Crown, Cobham*(66) and 20 *Armstrong v. Commissioner of Valuation in Ireland*(67). The Federal Land Tax Assessment Acts, 1910-1924, specifically include a hotel license (2 *Commonwealth Statutes*, 1658); and, in defining the term "rateable property," the Australian State rating statutes follow the English definition: *Melbourne Tramway and Omnibus Co., Ltd. v. Fitzroy Corporation*(68): *Collins on Valuation of Land*, 140, 2 *Commonwealth Statutes*, 1568. The questions asked in the originating summons 25 have been correctly answered by the learned Judge in the Court below, and the method of valuation set out in his judgment(69) is such that any competent valuer can apply. 30

Haggitt, in reply. The position in England as to machinery is dealt with in *Ryde on Rating*, 8th Ed. 280, 281, and the manner of arriving at the value of a hereditament is shown in *Tyne Boiler Works Co. v. Longbenton Overseers and Tynemouth Assessment Committee*(70). In New Zealand, machinery, as such, is not rateable property, but, if it is 35 annexed to the freehold, it becomes freehold, and, therefore, rateable. As to the rating of licensed premises, and the reasons for taking the license into account, see *Ryde on Rating*, 8th Ed. 650. The words "or property" in the English definition of "hereditament" are not the basis of any of the English decisions. As to goodwill being annexed to the premises, see 40 *Muller and Co.'s Margarine, Ltd. v. Inland Revenue Commissioners*(71), which distinguished *West London Syndicate, Ltd. v. Inland Revenue Commissioners*(72).

Cur. adv. vult.

O'LEARY, C.J. The City of Dunedin is a district wherein the system 45 of rating property on its annual value is in force.

The respondent is the owner and occupier of certain land and buildings in the City on which is a licensed hotel.

(64) (1815) 4 M. & S. 317; 105 E.R. 852.

(65) (1839) 10 Ad. & E. 157; 113 E.R. 60.

(66) [1906] 2 K.B. 754.

(67) [1905] 2 I.R. 448.

(68) [1901] A.C. 153.

(69) *Ante*, p. 352, l. 6.

(70) (1886) 18 Q.B.D. 81, 88, 89, 92.

(71) [1900] 1 Q.B. 310, 320, 321.

(72) [1898] 2 Q.B. 507.

Questions having arisen as to the correct method of ascertaining the rateable value of such premises for the purpose of assessing the rates thereon, an originating summons was issued to determine these questions. This was heard by *Fleming, J.*, whose judgment is the subject of the present appeal.

The questions asked in the summons are fully set out in the judgment which has been prepared by *Finlay, J.*, as are also the answers given by *Fleming, J.*

Shortly stated, the effect of the judgment in the Court below is that the publican's license and the goodwill of the business carried on should not be taken into account in arriving at the rateable value of the premises.

The contention of the appellant Corporation is that the license and the goodwill attached must be taken into account, and that the valuer's duty is to ascertain the value of the land together with the buildings thereon as an existing unit. Furthermore, anything that affects or enhances the value of the unit must be taken into account by the valuer, and as the buildings are licensed, they must be valued as such.

Respondent contended that the license and goodwill should not be taken into account in assessing the rateable value, and the question between the parties may be shortly expressed in these terms: Are hotels to be valued with or without regard to their licenses? It was this question that was argued in this Court. The matter is one of considerable financial and legal importance, and the case shows that the assessments of some thirty hotels in the City of Dunedin are dependent on the outcome of the appeal.

Finlay, J., has in his judgment reviewed the law and the cases at considerable length and with much helpful detail.

This renders it unnecessary for me to do more in my consideration of the question than to refer to a limited number of authorities and to relevant legislative provisions. Counsel for the Corporation strongly relied on the English law, based on many authorities, including judgments of the House of Lords, which he asserted established that, in the valuation of a licensed house for rating purposes, regard is had to the circumstance that the premises are licensed. He contended that these authorities were applicable to, and binding in, New Zealand, and that there was neither in the New Zealand legislation nor in the New Zealand decisions anything which made these authorities inapplicable.

Respondent's counsel contended that, because of the terms of our statutes and of certain decisions of our Courts, the English authorities did not apply, and that our legislation and decisions had the effect of excluding the license from consideration in arriving at the rateable value.

The solution of the problem depends to a great extent on whether there is any substantial difference between the English and New Zealand law, for it seems to be settled beyond question that in England, in fixing the annual value of licensed premises, regard must be had to the license.

In *Ryde on Rating*, 8th Ed. 648, it is said:

In valuing a licensed public house, the existence of the license must be taken into account (*R. v. Bradford*, (1815) 4 M. & S. 317, *Cartwright v. Sculcoates Union*, [1900] A.C. 150).

And, at p. 243, that:

Both before and after the Parochial Assessments Act, 1836, was passed, it was held that property must be valued as it exists at the time when the rate is made,

with all the then existing circumstances, or as it has frequently been expressed, "*rebus sic stantibus*."

Cartwright's case(1) was a decision under the Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96) (32 *Statutes at Large*, 298); the relevant provision of that statute, which was intituled "An Act to regulate Parochial Assessments," was in these terms:

1. No rate for the relief of the poor shall be allowed . . . or be of any force which shall not be made upon an estimate of the net value of the several hereditaments rated thereunto; that is to say of the rent at which the same might reasonably be expected to let from year to year free of . . .

Here follow certain assumptions which are not material for the present purpose.

It is to be remembered that rates are not a tax on income, but on the annual value of hereditaments, and, in ascertaining the annual value, a hypothetical tenancy is envisaged, and an endeavour is made to ascertain what rent a hypothetical tenant may be expected to pay.

Lord Halsbury, L.C., sitting in the Court of Appeal in *Cartwright's case*(2) said: "The problem is to ascertain, according to the statute, what a tenant from year to year might reasonably be expected to give as rent. For the solution of that problem it appears to me that apart from the decisions, as to which I will say a word presently, all that could reasonably affect the mind of the intending tenant ought to be considered"(3).

Collins, L.J., said: "The facilities incident to the hereditament itself are absolutely germane to the matter. One way of arriving at these facilities—probably the best way—is to inquire how far they have been efficacious in the past. What inference are we to draw from what we know, as to what business can be done on those premises by an ordinary tenant? Surely the business that has been done is the most important factor in arriving at a conclusion. Of course, it has to be qualified by any special circumstances"(4).

The House of Lords approved this decision, and *Lord Davey* says: "You have in each case to find out in the best way you can what is the rent which a tenant may reasonably be expected to give, and if the best way under the particular circumstances is to ascertain the use which a tenant might expect to be able to make of the premises, the facility afforded by the premises for the carrying on of a trade appears to me to be a primary and elementary consideration in the case. If you are to take into account the fact that the premises command a trade, you must surely ask what trade. Is it a large trade or is it a small trade? And I do not know myself any better test of what trade they may be expected to command than the trade which they actually do command. It is not that you rate the profits, it is not that you rate the man's skill and judgment or discretion in the mode of carrying on the business, but you have to ascertain what sort of a trade the hypothetical tenant, as he is called, may reasonably expect to be able to carry on on those premises as an element in determining the rent he would be willing to offer"(5).

It is clear, therefore, that the position under the Act of 1836 was conclusively established by the highest authority.

It is helpful to note that in Ireland in the case of *Armstrong v. Commissioner of Valuation in Ireland*(6) it was contended that the English authorities, including of course *Cartwright's case*(7), were not applicable in

(1) [1899] 1 Q.B. 667; aff. on app., (4) *Ibid.*, 679.

[1900] A.C. 150.

(2) [1899] 1 Q.B. 667.

(5) [1900] A.C. 150, 159.

(3) *Ibid.*, 673.

(6) [1905] 2 I.R. 448.

(7) [1900] A.C. 150.

Ireland because of the difference between the English and the Irish Acts. The Irish provisions were ss. 63 and 64 of 1 & 2 Vic., c. 56 (32 *Statutes at Large*, 810, 819, 820), and s. 63 provides that:

the following hereditaments shall be rateable hereditaments . . . viz., all
5 lands, buildings . . .

And s. 64 said:

every such rate shall be a poundage rate made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which one year with another the same might in their actual state be reasonably
10 expected to be let from year to year . . .

Again, there are certain assumptions not material for consideration.

It was contended that the words "in their actual state" made a substantial distinction between the English and the Irish position, but both the King's Bench Division and the Court of Appeal swept aside
15 this contention and other distinctions suggested, and, applying the principles laid down by, and following, the English authorities, held that, in ascertaining the value of a licensed public house, regard must be had to the existence of the license.

A matter of some importance stressed by *Gibson, J.*, is that the license
20 is not separately valued(8). The hypothetical rent is single and entire.

The Parochial Assessments Act, 1836, was repealed by the Rating and Valuation Act, 1925.

Section 22 of that Act provides for the ascertainment of rateable value
25 of a hereditament as follows:

(1) (b) If the hereditament is not such an hereditament as is mentioned in paragraph (a), there shall be estimated the rent at which the hereditament might reasonably be expected to let from year to year, if the tenant . . .

(c) The rateable value of a hereditament shall be taken to be the net annual
30 value thereof as ascertained under . . . paragraph (b).

Section 68, the definition section, defines "gross value" as meaning "the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook," &c., and "hereditament" means:

35 any lands, tenements, hereditaments or property which are or may become liable to pay any rate in respect of which the valuation list is by this Act made conclusive.

It is not suggested that this enactment has in any way altered the law as settled by *Cartwright's case*(9). Indeed, since its passing, the case
40 of *Robinson Brothers (Brewers), Ltd. v. Durham County Assessment Committee*(10) has been before the English Court of Appeal and the House of Lords. Whilst the main question in that case was different from the present, in the Court of Appeal, *Greer and Scott, L. JJ.*, and, in the House of Lords, *Lord Macmillan*, enunciated principles of rating valuation in entire
45 accord with those previously laid down. I note an excerpt from the judgment of *Scott, L.J.*, as follows: "Every factor intrinsic or extrinsic which tends to increase either demand or supply is economically relevant"(11).

In *Aberaman Ex-Servicemen's Club and Institute v. Aberdare Urban District Council*(12), a Divisional Court, consisting of *Lord Goddard*,
50 *L.C.J.*, and two other Judges, in dealing with a rating assessment cited the statement of *Lord Halsbury, L.C.*, in *Cartwright's case*(13) already set

(8) [1905] 2 I.R. 448, 483.

(9) [1900] A.C. 150.

(10) [1937] 2 All E.R. 298; aff. on app., [1938] 2 All E.R. 79.

(11) [1937] 2 All E.R. 298, 309.

(12) [1948] 1 K.B. 332; sub nom. *Aberdare Urban District Council*

v. Pontypridd Area Assessment Committee, [1947] 2 All E.R. 877.

(13) [1899] 1 Q.B. 667, 673.

out by me as being the principle to be applied, so that there is no doubt as to the law in England which is summarized in *Ryde on Rating*, 8th Ed. 651, as follows :

If it be established as a fact that higher rents are given for licensed than for unlicensed premises, it seems to follow as a matter of law that, in considering at what rent licensed premises may reasonably be expected to let . . . the existence of the license must be taken into account ; for "all that could reasonably affect the mind of the intending tenant ought to be considered [[1899] 1 Q.B. 667, 673]."

Before leaving the English authorities, one should refer to the matter of goodwill.

There is, of course, goodwill attaching to licensed premises, and this must be taken into account, but by this is not meant the personal goodwill attaching to a house because of the presence of a particular licensee. It is something which is attached to the premises, and is there irrespective of the personality of the person for the time being in charge of the premises.

In the extract from the judgment of *Collins, L.J.*, in *Cartwright's case*(14), he speaks of the "facilities" incident to the hereditament, and one way of arriving at these facilities is to ascertain what business can be done on those premises by an ordinary tenant. The ordinary tenant is, I think, the standard.

The matter of goodwill is summarized in *Ryde on Rating*, 8th Ed. 674, in the following passage which has received judicial approval (see *Armstrong v. Commissioner of Valuation in Ireland*(15)) :

The result appears to be that the rating authority in the first instance, and (on appeal) the sessions, must determine as a fact whether the "goodwill" of each public house dealt with is wholly or in part attached to the premises or not ; and if they find that it is, it appears to follow as a matter of law that the value of the "goodwill," so far as it is attached to the premises, must be regarded as part of the value of the premises, and must be taken into account in estimating the gross value, just as much as the existence of the license.

The law in England being settled, it remains to be considered whether the New Zealand statute or New Zealand decisions so alter the position as to result in the submissions of respondent being those which this Court should accept.

First, as to the statute law. In New Zealand, the important matters for consideration are the definitions of "rateable property" and "rateable value" in s. 2 of the Rating Act, 1925.

"Rateable property" (omitting the extensive list of exceptions) means "all lands tenements or hereditaments with the buildings and improvements thereon," and :

"Rateable value" (a) In respect of property within any district where the system of rating property on its annual value is in force, means the rent at which such property would let from year to year, deducting . . .

It is agreed that "such property" in the second definition is the "rateable property" of the earlier definition.

It is clear that, under the New Zealand Act, to ascertain the rateable value, the property is not valued, but the rent is assessed—that is, the hypothetical rent that would be paid by the hypothetical tenant. The position in this respect is no different from that in England, and there is nothing in the terms of our statutory provisions that makes such a difference as would enable this Court to hold that the English decisions do not apply.

(14) [1899] 1 Q.B. 667, 679.

(15) [1905] 2 I.R. 448, 493.

The Act of 1836 under which *Cartwright's* case(16) was decided required an estimate of the rent at which the hereditament might be expected to let from year to year.

In our Act, it is the rent at which "such property"—i.e., lands, tenements or hereditaments—would let from year to year.

The English Act of 1925 in the definition of "hereditament" introduced the word "property," defining hereditament as meaning "any lands tenements hereditaments or property." *Fleming, J.*, was of opinion(17) that the word "property" might serve to explain any difference at present existing between the systems of rating on annual value in England and in this country.

I do not think that the addition of this word alters the position, and this view is strengthened by the fact that, while the case of *Robinson Brothers (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment Committee*(18) was decided under the Act of 1925, the judgments in that case do not suggest that the addition of this word "property" made any difference to the principles applicable in ascertaining the hypothetical rent—that the valuation should be *rebus sic stantibus*.

Mr. Meade's main contention for the differentiation between the English and the New Zealand law rested on the decision in *In re Joseph*(19) and the decisions which followed it—namely, *In re Gilmer, Public Trustee v. Commissioner of Stamp Duties*(20) and *Heel v. O'Neill*(21).

The argument was that these cases decide that a hotel license is not an interest in land, but is some special kind of property. That rateable value is determined on the rent of rateable property—i.e., lands, tenements, or hereditaments—and, therefore, the license, not coming within the definition of property, cannot be rated.

I do not accept this contention.

The decision in *In re Joseph*(22) should be examined.

It was a death-duties case and required a consideration of the Valuation of Land Act for the reasons set out(23) in the report. Section 11 of the Government Valuation of Land Act, 1896, provided that the valuations under that Act were to be used for the purpose of assessing duties under the Deceased Persons Estates Duties Act, 1881. The basis on which land had to be valued for the purposes of the latter Act was to be found in the Government Valuation of Land Act Amendment Act, 1900, and consisted of two factors which together constituted the "capital value" of the land. These factors were the unimproved value of the land and the improvements upon same, and it was decided that a hotel license, held in respect of the premises, could not be considered in estimating the value of either. It was held to be separate property. I do not think that this case can be treated as an authority on the construction of the Rating Act. It was concerned with the ascertainment of "capital value" under the Valuation of Land Act, but it has no bearing, in my opinion, on the ascertainment of "rateable value" under the Rating Act, being the hypothetical rent payable by a hypothetical tenant.

The argument is further answered by this: that, in ascertaining the hypothetical rent, the license is not valued as property. It is no more valued as such than is, say, the situation of the property in a particular street. But in appropriate cases this last factor is taken into account as an enhancement of the rental value, so also can the existence of a license and the goodwill attached be considered an enhancement

(16) [1900] A.C. 150.

(17) *Ante*, p. 347, l. 1.

(18) [1938] 2 All E.R. 79.

(19) (1905) 25 N.Z.L.R. 225.

(20) [1929] N.Z.L.R. 61.

(21) [1933] N.Z.L.R. 319.

(22) (1905) 25 N.Z.L.R. 225.

(23) *Ibid.*, 230.

increasing the rental value, though the license as such is not itself valued.

I have therefore come to the conclusion that there is no difference in the law applicable in England and in New Zealand.

It follows that I am of opinion that, in ascertaining the rateable value of hotel premises in the City of Dunedin, regard must be had to the existence of the license and the goodwill attached thereto.

I agree with the answers to the questions as proposed by *Finlay, J.*, and would allow the appeal.

KENNEDY, J. There was no debate as to the proper answers to be given to the first and second questions. The valuer is not to value separately the license and goodwill of the business carried on under such license as if the license and the goodwill in themselves and by themselves are rateable property as defined in s. 2 of the Rating Act, 1925. "Rateable property" means all lands, tenements, or hereditaments, with the buildings and improvements thereon, and the license and the goodwill, in themselves, do not come within that definition: *In re Joseph*(1) and *In re Gilmer, Public Trustee v. Commissioner of Stamp Duties*(2). So also it is beyond question that Question 2 should be answered, "Yes."

The third question poses the question whether the valuer, in assessing or fixing the rateable value of the premises, (a) is entitled to treat the premises as licensed premises, or (b) may take into account their natural suitability, more or less, such as it is, for the business of a publican, but must leave out of account the license and proceed upon the basis that premises are in fact unlicensed, and that the tenant himself must, if he wishes to carry on the business of publican, at his own cost acquire a license under the Licensing Act, 1908. In the argument on the appeal, it appeared that the broad question was simply whether the valuer, in valuing the premises, must take into account the fact that the premises are licensed premises, and must take account of enhancement of value, if there be such, due to the fact that there is a license and a goodwill attached to the premises which is not purely personal. The learned Judge in his answer considered the second form of the question as furnishing the true answer, and rejected the first, when he said of the valuer of licensed premises: "He must not include the license or goodwill which accompanies the license, as adhering to the licensed premises in whole or in part"(3). Other answers supplementary to this were given, but the real cleavage is between the view as to whether the valuer may value the premises as licensed premises and that as to whether he must disregard the license and value them as unlicensed premises but suitable for a license. This is the question in issue, and all the other answers will follow from the determination of this question.

The valuer is to determine the rateable value. In respect of property within any district where the system of rating property on its annual value is in force, as in Dunedin, this means:

the rent at which such property would let from year to year, deducting therefrom twenty per centum in case of houses, buildings, and other perishable property, and ten per centum in case of land and other hereditaments, but shall in no case be less than five per centum of the value of the fee-simple thereof.

"Property" means rateable property, and "rateable property" means all lands, tenements, or hereditaments, with the buildings and improvements thereon.

(1) (1905) 25 N.Z.L.R. 225.

(2) [1929] N.Z.L.R. 61.

(3) *Ante*, p. 35, l. 14.

The language of this statute is substantially identical with that in England used in the Parochial Assessments Act, 1836, the Valuation (Metropolis) Act, 1869, and the Valuation of Land Act, 1925, and the task of valuation in each case was essentially the same. In the Parochial Assessments Act, 1836, there had to be determined :

the net annual value of the several hereditaments rated thereunto ; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent.

In the Valuation (Metropolis) Act, 1869, there had to be determined gross value, which was defined in s. 4 as meaning :

the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent.

The rateable value was obtained by ascertaining the gross value and deducting therefrom the probable annual average cost of the repairs, insurance, and other expenses as aforesaid. The Rating and Valuation Act, 1925, s. 68, similarly defined "gross value" as meaning :

the rent at which a hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes, and tithe rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent.

All these statutes are *in pari materia*, and the language used is so essentially the same and the problem so nearly identical that, in my view, the principles elucidated in the English authorities, upon these sections, apply in New Zealand. The extent to which they would apply in Ireland upon somewhat similar statutory problems was considered in *Armstrong v. Commissioner of Valuation in Ireland*(4) and answered affirmatively, and a general reference was made to the similarity in the underlying scheme or idea in the statutes in various jurisdictions in *Dunedin City Corporation v. Young*(5).

These authorities show that the valuer is to take the premises as they actually are, and he may treat them as enhanced in value, if it is so, by reason of the fact that they are licensed ; for the annual value of premises as licensed premises may be greater than the value of them as unlicensed premises. All agree that you may take the premises as you find them with all their advantages and disadvantages—*rebus sic stantibus*. I think the course of the authorities is uniform, and so much is the fact that the premises are licensed premises a circumstance to be taken into account that judgments frequently proceed to deal with them as such without stopping to inquire whether that is a proper way to approach the problem of valuation. In so doing, the valuer is considering nothing different than when, with regard to the valuation of land, he considers advantages of site and suitability for special purposes. He is not valuing a license or goodwill as such, but is valuing premises as licensed premises, and, therefore, enhanced in value, it may be, by the existence of the license. The valuation is of an actual hereditament, but, for the purpose of ascertaining value, the tenant is an hypothetical, and not an actual, tenant.

(4) [1905] 2 I.R. 448.

(5) [1941] 4 N.Z.L.G.R. 72.

It will be sufficient to refer to the landmarks of authority, and, first, to *The King v. Bradford*(6). This case, decided in 1815, and usually called the *Canteen* case, is said to be the earliest case in which it was held that the existence of a license should be taken into account. It was decided before the Parochial Assessments Act, 1836, and of course before the Poor Rate Exemption Act, 1840, expressly excluded personal property from consideration, but the case has been regarded subsequently as authority, and frequently quoted. Bradford was a tenant of a canteen in Hythe Barracks for which he paid £15 as rent :
and also the further sum of £510 for the privilege of using the same as a canteen, and selling therein provisions and liquors, &c.

It was held that the two payments constituted in substance but one rent payable for the enjoyment of the hereditament and for the enjoyment of the advantage belonging to it. Lord Ellenborough, C.J., compared the canteen to the case of a "soke mill" at which all the inhabitants of the neighbourhood were bound to grind their corn. Such mill would let at a higher rental, and would therefore have a higher annual value.

This was followed in time by *West Middlesex Waterworks Co. v. Coleman*(7). The problem involved was to ascertain the annual value of a public house for the purpose of the water rate, it being considered that it must be taken into account for the purpose of the poor rate, and it was held the existence of the license must be taken into account. Smith, J., in the course of his judgment, said : "It seems to me that 'annual value' means annual value of the house as it stands and as it is occupied, viz., as a public house with a license. I therefore think that the Magistrate was right in taking the fact that it was a licensed house into consideration in estimating the value"(8). Then came *Cartwright v. Sculcoates Union*(9), and this case, with *Robinson Brothers (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment Committee*(10), contains an authoritative exposition of the most of the law relevant to the valuation of licensed premises. *Cartwright v. Sculcoates Union*(11) came first before a Divisional Court on a special case stated by an arbitrator. It was expressly stated that the appellant's contention was :

(1) That in valuing the public house for the purpose of the poor rate, the existence of the license must be left out of consideration, on the ground that the license was a personal privilege granted to the occupier, and did not increase the value of the hereditament itself.

This contention was rejected by the arbitrator, and throughout the whole course of the subsequent proceedings, including the House of Lords, there is no suggestion that this was wrong ; and, indeed, the whole discussion proceeds upon the basis that, when you come to ascertain the rateable value of premises in respect of which there is a license, they are to be valued as licensed premises, and that you take into account any enhancement of value due to the existence of the license.

I may refer to *Armstrong v. Commissioner of Valuation in Ireland*(12), particularly to the judgment of Gibson, J., who, with reference to the course of the decision, said : "In 1815, as appears from the judgment of Le Blanc, J., in *R. v. Bradford* (4 M. & S. 317, 323), public houses were treated as recognized subjects of rating. There a canteen was held rateable on the same principle. From this date no question has ever been raised as to the annual value of licensed premises including

(6) (1815) 4 M. & S. 317 ; 105 E.R. 852.

(7) (1885) 14 Q.B.D. 529.

(8) *Ibid.*, 538.

(9) [1900] A.C. 150.

(10) [1938] 2 All E.R. 79.

(11) [1900] A.C. 150.

(12) [1905] 2 I.R. 448.

"the license. *Allison's* case (4 E. & B. 13), recognized in the *London*
 "and *North-Western Railway* case (L.R. 9 Q.B. at p. 145), the *West*
 "Middlesex Water Works case (14 Q.B.D. 529) and *Cartwright's* case
 "([1900] A.C. 150), conclusively establish the law. There was a difference
 5 "of opinion between the Queen's Bench and Common Pleas on the
 "question whether a brewery owning tied houses could be deemed thereby
 "increased in value; but it was never doubted that the public houses
 "must be rated with regard to their licensed character. The ingenuity
 "of counsel has suggested many objections to valuing licensed premises
 10 "as such: for example, the personal character of the license, its tempor-
 "ary character, and diminishing value if there were convictions recorded.
 "All these difficulties have been treated as negligible by the English
 "Judges. The premises are valued in their actual present condition
 "with the license attached. The earning capacity of the premises as
 15 "they stand is what is considered, irrespective of the personality of the
 "license-holder. Someone must hold the license, but the value of the
 "public house does not depend on the accidental competence or incom-
 "petence of the publican, but on the earning power of the licensed here-
 "ditament. It is therefore inaccurate, I think, to say that goodwill
 20 "is considered in the valuation, if goodwill means the advantage resulting
 "from the occupier's personal connection with the business carried on
 "in the public house"(13). Lord O'Brien, L.C.J., said: "Lord
 "Macnaghten, in giving judgment in the House of Lords in *Cartwright's*
 "case, at p. 153, said: 'It appears to me that the volume of business
 25 "'done in a public house, as apparent to the man in the street—if I may
 "'use such an expression—is the very first thing that a tenant proposing
 "'to make an offer for such a house would take into consideration.'
 "Lord Macnaghten uses the expression 'public house.' He
 "deals with it such as it was—not as a mere brick-and-mortar edifice"(14).
 30 *The King v. Shoreditch Assessment Committee, Ex parte Morgan*(15),
 generally known as the "Crown and Shuttle" case, followed. Finally
 came *Robinson Brothers (Brewers), Ltd. v. Houghton and Chester-le-*
Street Assessment Committee(16). The point actually involved is a
 35 different one, but here again it is assumed, although not expressly stated,
 that premises licensed are to be valued as licensed premises, and I refer
 in particular to a statement where Lord Macmillan said: "Nor, in
 "taking into account the rent which a brewer would pay, is there any
 "violation of the principle that the valuation must be *rebus sic stantibus*.
 "It is precisely because the hereditament is a public house, and is to
 40 "continue to be used as such, that it attracts the brewers' competi-
 "tion"(17).

The general result of these authorities seems to me to necessitate
 this—namely, (a) that the valuer should value the premises as they are,
 with all advantages and disadvantages, including, if it is a fact, that a
 45 license is attached to the premises, (b) that he should take into account
 any enhancement of the value of the premises resulting in increased
 annual value if the premises are, in fact, enhanced in value by the exist-
 ence of the license, and (c) that he should not have regard to goodwill
 purely personal in character not adhering to the premises.

50 In the result, then, I think the appeal should be allowed. If the
 answer to Question 1 is understood as above, then it should stand. As
 to Question 3, the answer proposed in the judgment of *Finlay, J.*,
 should, in my view, be substituted for that given by the learned Judge.

(13) *Ibid.*, 471, 472.

(16) [1938] 2 All E.R. 79.

(14) *Ibid.*, 487.(17) *Ibid.*, 86.

(15) [1910] 2 K.B. 859.

FINLAY, J. This is an appeal against a declaratory order made by *Fleming, J.*, on November 20, 1947, at Dunedin on an originating summons issued under the Declaratory Judgments Act, 1908. In the initial proceedings, in which the present respondent was plaintiff and the present appellants were defendants, an order was sought determining, in the language of the summons :

1. Whether the first-named defendant, the above-named Corporation and/or the second-named defendant, its valuer, is entitled to assess the plaintiff under the Rating Act, 1925, as the owner and occupier of the said premises—*i.e.*, the Captain Cook Hotel—situate in the City of Dunedin, the said City being a district wherein the system of rating property on its annual value is in force and to fix the rateable value of the said premises upon the principle that the publican's license under the Licensing Act, 1908, held by the plaintiff and in force in respect of the said premises and the goodwill of the business carried on under such license are included in the definition of the words "rateable property" contained in s. 2 of the Rating Act, 1925.

2. Whether the first-named defendant and/or its valuer, in assessing and fixing as aforesaid are to proceed upon the principle that the words "such property" in subs. 2 under the definition of "rateable value" in the said s. 2 refer to and mean "rateable property" as defined by the said s. 2 and no other property.

3. Whether, in assessing and fixing the rateable value of the said premises, the first-named defendant and/or its valuer is entitled (a) to treat and envisage the said premises as an existing unit—that is to say, as licensed premises or an hotel in respect of which there is in force a publican's license under the Licensing Act which will be available to the tenant during the term of his tenancy—or (b) to treat and envisage the said premises as premises in greater or less degree suitable depending on the situation thereof and the size and design of the buildings thereon for carrying on therein a publican's business subject to the tenant obtaining in respect thereof a publican's license under the Licensing Act, 1908.

In addition to the specific topics raised by these questions, the Court was asked generally to define what principles were to be applied "in determining the rateable value of the said premises."

The learned Judge answered the first question in the negative and the second question in the affirmative. To the remaining subjects of inquiry he gave a composite answer. That answer reads as follows : "A valuer should assess licensed premises in respect of which a publican's license is in force, as follows : (a) He will assess the land and buildings only as they stand, with all their advantages and disadvantages, for the purposes of a publican's business, or of any other business, or purpose, for which there is a probable demand, including the fact that the premises have been approved by the Licensing Authority as licensed premises. (b) He must not include the license or goodwill which accompanies the license, as adhering to the licensed premises in whole or in part. (c) He will take into consideration the increment in the value of the land (in common with that of other land in the vicinity) by reason of its suitability for a site for a retail or other profitable business. (d) He will take into consideration all probable competition from hypothetical tenants, and also the improbability of competition where the tenant or occupier owns the license. (e) Where the landlord owns the license, the valuer will take into consideration that any prospective tenant will have to purchase the license, or the use of it, at full value, and that any apparently excessive rental for the licensed premises may be an indirect payment for the license and goodwill adhering thereto. (f) He will consider whether or not the lower rent payable by a brewer's tenant, who is bound to purchase his beer, &c., [sic] from his landlord, is not in fact too low for the licensed premises, and, similarly, whether or not the higher rent is not a penal one. (g) He may take into consideration the availability, or otherwise, of other sites within a radius of half a mile, suitable or adaptable for use as licensed premises, or for the erection

“of suitable buildings for licensed premises thereon. (h) He will also take into consideration any legislation or law restraining the aggregation of land, and therefore restricting competition; or making provision for the fixing of a fair rent for business premises. (i) With these and any other relevant considerations in mind, he will fix the assessable value in the manner laid down in *Dunedin City Corporation v. Young* ([1941] N.Z.L.R. 959)”(1).

These elaborate directions were, no doubt, prompted by a desire upon the part of the learned Judge to be helpful, but their elaboration conflicts with the view expressed by *Lord Halsbury*, L.C., that the enumeration of elaborate rules for determining a question of business fact embarrasses and complicates the solution: see *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee*(2) and *Armstrong v. Commissioner of Valuation in Ireland*(3).

The essential feature of the order for present purposes is its declaration that the land and buildings in question should be valued (due account being taken of their advantages and disadvantages generally) as premises fit and available for use for the purposes of a publican's business or for any other business or purpose for which a probable demand existed at the date of the valuation, but that any enhancement of the value of the premises attributable to the fact that the premises were licensed premises or that a goodwill existed in respect of the business being conducted there should be disregarded and not taken into account. The only qualification conceded by the Judge in respect of the latter phase of his order was that the fact that the premises had been approved as licensed premises by the Licensing Authority might be taken into account.

This definition of the material feature of the judgment was accepted by counsel for all parties upon the hearing of the appeal. Their arguments were wholly confined, in consequence, to the question whether, under the Rating Act, 1925, it was right or wrong for a valuer to attribute an enhancement of value to premises by reason of the fact that the premises were licensed premises and that a goodwill attached to them in virtue of the business then, in fact, and concurrently, being conducted there. It is this neat question which the Court is primarily concerned to consider, for the correctness or otherwise of most, if not all, of the conclusions expressed in the judgment wholly depends upon the answer to that one fundamental question.

This statement of the crucial question with which the Court is concerned, quite irrespective of the nature of the argument before the Court in these proceedings, serves to demonstrate the inappositeness, for the purposes of the proceedings, of the first and second questions in the originating summons.

No one has contended that the license issued in respect of the premises or the goodwill of the business associated with the premises could, apart from the effect by way of enhancement, be included in the definition of “rateable property” in s. 2 of the Rating Act, 1925. As independent elements they clearly could not be, for they are neither lands, tenements, nor hereditaments, nor buildings nor improvements thereon. Any suggestion to the contrary would conflict with the judgments in numerous cases such as *Toohy's, Ltd. v. Valuer-General*(4), *In re Joseph*(5), and *In re Gilmer, Public Trustee v. Commissioner of Stamp Duties*(6).

The first question can therefore be summarily disposed of by giving to it a negative answer. The second question invites an equally summary

(1) *Ante*, p. 352, l. 6.

(2) [1901] A.C. 175.

(3) [1905] 2 I.R. 448, 478.

(4) [1925] A.C. 439.

(5) (1905) 25 N.Z.L.R. 225.

(6) [1929] N.Z.L.R. 61.

answer. Rateable value can only sensibly relate to rateable property. To attribute to it any other application would conflict with good sense. The expression "such property" in the definition of "rateable value," therefore, by its relation to the previous word "property" in the definition has reference only to rateable property as defined in the Act, and to no other class or type of property. The answer to the second question must inevitably, therefore, be in the affirmative. The answers given by the learned Judge, in the sense here expressed, to the first and second questions were not challenged upon the appeal. They are unquestionably right, and must stand.

The third question is unhappily phrased if the intention were that it should provide a basis for the introduction of the essential question involved in these proceedings. Taken, however, in conjunction with the fourth and general question, it is sufficient. Clarity, however, requires an appreciation of the fact that Question 3, by its introduction of the idea that the value of a property could be affected by the hypothetical acquisition, either by immediate treaty or future grant, of some additional and different form of property such as a publican's license, tended merely to complicate the real issue. With that complication it is not necessary to deal in this judgment. The interests of clarity will be served, however, if it be repeated that the only question argued before this Court was whether the existence of a license in respect of licensed premises and of a goodwill in the business currently being conducted in those premises could, under the provisions of the Rating Act, 1925, having relation to rating upon annual value, be treated as enhancing the value of the premises.

The mere statement of the question indicates that in any given case it involves two mutually independent questions: one a question of fact, the other a question of law. Whether the existence of a license or of goodwill operates as an enhancement, and, if so, to what extent, are questions of pure fact. Whether the valuer can properly take any such enhancement, if it exists, into account is a question of law.

It is as to this question of law that the parties to this appeal differ. The appellant contends that enhancement due to the existence of a license and to goodwill can and should be taken into account: the respondent contends that it cannot and should not. The solution of the question thus raised demands a critical examination of the authorities upon which each relies. Any such examination should, however, proceed upon a sustained appreciation of the fact that what in New Zealand a valuer has to determine and assess under the Rating Act, 1925, when valuing rateable property which is subject to rating upon the annual value system is, in the words of the Act:

the rent at which such property would let from year to year, deducting therefrom twenty per centum in case of houses, buildings, and other perishable property, and ten per centum in the case of land and other hereditaments, but shall in no case be less than five per centum of the value of the fee-simple thereof.

Primarily, therefore, what has to be ascertained is the rent at which such property would let from year to year. In the ultimate result, the determination of what the Legislature, by its prescription in this respect, intended should be taken into account must be conclusive of the issue between the parties. The conclusiveness of the intention of the Legislature would doubtless be inevitable in any event, but express authority for it is provided in the judgment of this Court in *Duncan v.*

Mackie(7). There the conclusiveness of the statute or authority under which a valuation is made as to what is and what is not to be brought into account is clearly illustrated and affirmed. *Perpetual Trustees, Estate, and Agency Co. of New Zealand, Ltd. v. Wilson*(8) is to the same effect.

5 No further reference to authority in that respect is necessary.

With these considerations in mind, reference can usefully be made to the authorities to which we were referred to ascertain the extent to which the law on the subject has been declared. Some of the authorities deal specifically with the effect on value of the existence of a license: some with
10 the effect of the existence of goodwill. Any of the latter which deal with the trade of a licensed house necessarily postulate the possession of a license by the hypothetical tenant, for without it he cannot enjoy the goodwill. To this extent they are relevant to the question whether premises should be valued as licensed premises as well as to the question
15 whether goodwill should be taken into account as an enhancing factor.

The earliest authority in point of time was *The King v. Bradford*(9). This case was decided in 1815. As it has been made the subject of reference in later cases, no particular analysis of it is necessary. It is
20 sufficient to say that it was there held by a Court presided over by Lord Ellenborough, C.J., that a sum expressed to be payable for the privilege of using premises as a canteen for a year constituted a part of the rent of the premises. There afterward followed the judgment of Lord Coleridge, C.J., in *West Middlesex Waterworks Co. v. Coleman*(10), where it is said:
25 "It appears to me that the fact of this house being a licensed house is, while the license continues, an element of its value: it is a circumstance which makes the lessee willing to give more for it, and enables the lessor to get more. It seems to me, therefore, that it enters fairly into the consideration by which the annual value of a dwellinghouse is to be
30 "determined"(11). *Smith, J.*, in the same case said: "It is a public house, it has a license, and everybody knows that a licensed house is, more valuable to an owner than an unlicensed house. It seems to me that the learned Magistrate was quite right in computing the value of this house, not as a beerhouse without a license, but as a licensed
35 "house"(12).

Later came the authoritative case of *Cartwright v. Sculcoates Union*(13) in the Court of Appeal. In that case, the question of both the effect upon value of a license and of goodwill presented itself. The case was decided after the rating of personal property had been prohibited and under
40 a statute which prescribed the measure of rateable value as being "the rent at which the same might reasonably be expected to let from year to year free of usual tenants' rates and taxes."

There, as here, it was contended before the arbitrator who made the initial finding that, in valuing a public house for the purpose of the poor
45 rate, the existence of the license must be left out of account, on the ground that the license is a personal privilege granted to the occupier, and does not increase the value of the hereditament itself(14). It was also contended before the arbitrator that, if the preceding contention were wrong, then the public house should be valued without reference to the goodwill
50 and to the trade already done there(15). The arbitrator held both contentions to be wrong in law, the first in its entirety, the second as to

(7) [1940] G.L.R. 226, 230, 233.

(8) [1945] N.Z.L.R. 755.

(9) (1815) 4 M. & S. 317; 105 E.R. 852.

(10) (1885) 14 Q.B.D. 529; 52 L.T. 578.

(11) *Ibid.*, 582.

(12) *Ibid.*, 583.

(13) [1899] 1 Q.B. 667.

(14) *Ibid.*, 670.

(15) *Ibid.*, 671.

that part of the goodwill attaching to the premises in contradistinction to that part which was personal to the licensee. His assessment of value was accordingly made upon the legal basis he enunciated. *Lord Halsbury, L.C.*, in sustaining the arbitrator's valuation, said: "I think the arbitrator has properly arrived at a conclusion at which he was entitled to arrive. So far as the quantity is concerned, that question is not before us, but only whether he was entitled to arrive at the conclusion he has done on the materials he has enumerated as the materials upon which he formed his judgment"(16). 5

A. L. Smith, L.J., held that evidence was receivable to prove the volume of trade being done in the premises in order to prove that the house was "in a good position to command a good trade, and therefore the hypothetical tenant would give more than he otherwise would"(17). *Collins, L.J.*, also held that evidence of the trade done in the premises was admissible(18). 15

The case before the Court of Appeal was primarily concerned with the admissibility of evidence as to the trade actually done, but every feature of the arbitrator's findings was before the Court and, by dismissing the appeal, it confirmed the propriety of his conclusions. The judgment of the Court of Appeal was made the subject of an appeal to the House of Lords(19), and much illumination is shed upon the whole topic by the opinions expressed by the learned Law Lords. Here again, the question of the admissibility of evidence was the predominant subject of consideration. However, all the findings of the arbitrator and his reasons for them were before the House, and what was said and done can be interpreted in the light of that circumstance. That being so, the opinion of *Lord Macnaghten*(20) is clearly in point so far as that form of goodwill is concerned to which the arbitrator had assessed a value. He said: "What the learned arbitrator has done is to take into consideration the amount of business which this public house was doing. Was he wrong in that? Surely the very first thing that a tenant who was going to offer for a house of this sort would do would be to consider (roughly if he could not do it accurately) what amount of business the house commanded. It appears to me that the volume of business done in a public house, as apparent to the man in the street—if I may use such an expression—is the very first thing that a tenant proposing to make an offer for such a house would take into consideration. That really is all that the arbitrator has done"(21). 30

In conclusion, he said: "All we have to consider is whether in the particular circumstances of this case the arbitrator is right or wrong. I think he is right"(22). 40

It will be noted that neither before the Court of Appeal nor before the House of Lords was any challenge addressed to the propriety of the arbitrator assessing an enhancement of value to the premises by reason of the fact that they were licensed premises. That an enhancement had been so assessed was, of course, known to *Lord Macnaghten*, yet he affirmed the correctness of the findings as a whole. Views similar to those expressed by *Lord Macnaghten* were expressed by *Lords Morris and Shand*. The latter pithily summarized his conclusion when he said: "The simple question which had to be answered by the arbitrator, and which this House has now to consider in dealing with his award, is: At what rent would the premises be reasonably expected to let from year to year?" 50

(16) [1899] 1 Q.B. 667, 676.

(17) *Ibid.*, 677.

(18) *Ibid.*, 678.

(19) [1900] A.C. 150.

(20) *Ibid.*, 153.

(21) *Ibid.*, 153.

(22) *Ibid.*, 154.

"I am of opinion with your Lordships that the arbitrator has taken the proper elements into view in deciding that question"(23).

Only unnecessary prolixity would result from references to the opinions expressed by the remaining Law Lords. All agreed that the arbitrator had acted properly and upon proper grounds. Thus a finding attributing enhancement to the value of premises by reason of their being licensed premises and by reason of their having the goodwill of a business associated with them ran the gamut of three Courts, one of them of penultimate authority in England and one which was then of ultimate authority in Britain as it is still the ultimate authority for England and Scotland.

Cartwright v. Sculcoates Union(24) came under consideration in *Armstrong v. Commissioner of Valuation in Ireland*(25). There the Court was concerned with a statute, the Valuation Act, 1852, which required that a valuation should be made upon an estimate of annual values—that is, the rent for which, one year with another, the property in its actual state might reasonably be expected to let from year to year. It was held by the Court of Appeal in Ireland that the Act was substantially identical with the Act under which *Cartwright v. Sculcoates Union*(26) was decided; that the latter issue was authoritative and should be followed; and that, in consequence, in ascertaining the value of a public house, regard must be had to the existence of the license. The Lord Chief Justice, after approving of the statement in a text-book that goodwill, so far as it attaches to the premises, must be regarded as part of the value of the premises, said: "In England the hereditament and license attached are regarded as a single entity made up of house and license. The house, so to speak, was clothed with a license, and it is valued accordingly in England, such as it is, a public house, and not, such as it is not, a mere, bare, unlicensed brick-and-mortar building. I think the same rule should obtain in Ireland"(27).

Cartwright v. Sculcoates Union(28) also came under consideration in *The King v. Shoreditch Assessment Committee, Ex parte Morgan*(29). That case had relation to the value called the "gross value" defined in s. 4 of the Valuation (Metropolis) Act, 1869, as meaning:

the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for an hereditament, if the tenant undertook to pay all usual tenant's rates and taxes, and tithe commutation rentcharge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent.

An increase in the annual license fee had been imposed, and the question presented itself whether, in view of the increase, the ratepayer was or was not entitled to a reassessment of the gross value under s. 47 of the Valuation (Metropolis) Act, 1869.

Lord Alverstone, C.J., and Grantham and Channell, JJ., agreed that it did so entitle the ratepayer. The view of the Chief Justice is expressed in the words: "We should be shutting our eyes to the natural conclusion to be drawn from the facts if we were to assume that a tenant, in estimating the annual rent which he would pay for the premises, would not take into consideration that he had to pay an annual charge of £130 as distinguished from an annual charge of £35"(30). Grantham, J., said: "Therefore this great increase in the license duty is a cause which has *prima facie* reduced the rental value and therefore the annual value

(23) *Ibid.*, 156.

(24) [1900] A.C. 150.

(25) [1905] 2 I.R. 448.

(26) [1900] A.C. 150.

(27) [1905] 2 I.R. 448, 493.

(28) [1900] A.C. 150.

(29) [1910] 2 K.B. 859.

(30) *Ibid.*, 862.

"of this house"(31). *Channell, J.*, said: Inasmuch, therefore, as licensed houses are undoubtedly valued at an increased value beyond that which they would have if no license were attached to them and if they were occupied as private dwellinghouses only or as shops or banks, and not for the purpose of carrying on the particular trade of a licensed victualler, it is impossible to say that the amount of the license duty which the tenant has to pay for permission to carry on that particular trade on the premises is not an element to be taken into consideration in ascertaining the annual value of the premises"(32). Later, he referred to the increase in the duty as "a matter which *prima facie* must affect the amount of the profits from the business done in the house, and therefore the value of the house"(33).

All the Judges, in effect, set off the increased expenditure against the profits a hypothetical tenant might expect to make by his tenancy of the premises. They thus assumed that, when considering the rent he would pay, such a tenant would give consideration to what, in effect, is the goodwill he might expect to find attaching to the premises. Such a consideration would clearly, in their view, affect the value of the premises. In this they were, of course, merely following *Cartwright v. Sculcoates Union*(34). An appeal to the Court of Appeal was dismissed. Incidentally, it is not immaterial to note the dictum of *Cozens-Hardy, M.R.*, in the course of his judgment in the appeal proceedings, that a license: "is not like a gun license or a dog license. Though granted to an individual, it is only granted to him as occupier of this particular house"(35).

At this point a case under the Finance (1909-10) Act, 1910 (Eng.), *Inland Revenue Commissioners v. Fitzwilliam*(36), came before the Courts. It had relation to a duty known as reversion duty, which is charged on the value ascertained, as the Act directs, of the benefit accruing to a lessor by reason of the determination of a lease. On a property leased for fifty years from 1861 at an annual rental of £4, the lessee or one of the mesne assignees had erected premises which became licensed premises. At the end of the lease the premises were occupied by, and the license was in the name of, a tenant or manager of a brewery company. It was agreed that the total value of the property at the determination of the lease was £300 if the premises were unlicensed, but that the total value of the property, including the value of the license, was £500. The Inland Revenue Commissioners claimed that the latter value should be treated as the value in relation to which duty should be computed. *Horridge, J.*, held(37) that, in estimating the total value of the land for the purpose of assessing the reversion duty, the fact that the premises on it were licensed, and that the value of the land was thereby enhanced, was an element to be taken into consideration.

On appeal, *sub nom. Inland Revenue Commissioners v. Earl Fitzwilliam*(38), it was contended by the appellant that, as the duty was imposed only in respect of land, the value of a license to sell intoxicating liquors could not be included. *Cox v. Harper*(39), which will be considered later, was relied upon. For the respondent, it was contended (*inter alia*) that the license did not form part of the land but was an element to be considered in determining the value of the land. *Lord Cozens-Hardy, M.R.*, held that *Horridge, J.*, had rightly held that the increased value owing to the existence of the license must be taken into

(31) [1910] 2 K.B. 859, 865.

(32) *Ibid.*, 867.

(33) *Ibid.*, 867, 868.

(34) [1900] A.C. 150.

(35) [1910] 2 K.B. 859, 876.

(36) [1913] 1 K.B. 184; aff. on app., [1913] 2 K.B. 593; aff. on app., [1914] A.C. 753.

(37) *Ibid.*, 189.

(38) [1913] 2 K.B. 593.

(39) [1910] 1 Ch. 480.

account. *Kennedy, L.J.*, agreed with the Master of the Rolls. *Buckley, L.J.*, disagreed. *Kennedy, L.J.*, said: "If I follow correctly the arguments put forward in this Court and in the Court below, it is said by the appellant that the element which the buyer from Lord Fitzwilliam
5 "recognizes in the price which he is willing to give in the open market for this property ought not to be considered in valuing this property, because the license is a personal grant to the licensee; it is a part of the goodwill of the business; it is not like goodness of site, a fixed or permanent element of value, but one that may be lost by the forfeiture
10 "of the license or by its non-renewal through one or other of the causes which existing legislation sanctions as causes for the non-renewal of 'old on-licenses.' I find myself unable to accept this reasoning. The license is in form a grant to a person who thereby becomes for the time the holder of the license; but the grant is made to him only in
15 "respect of the particular premises. It is really attached to those premises. It is not, as the goodwill of a business may be, a separately saleable thing. It cannot be transferred to other premises without the authority of the Magistrates and the consent of the owner of the premises in respect of which it was granted"(40).

20 A publican's license in New Zealand has characteristics analogous to, if not identical with, those characteristics of the license with which *Kennedy, L.J.*, was concerned and to which he referred. This is shown by s. 129 of the Licensing Act, 1908.

The learned Lord Justice continued: "The 'old on-license' does not
25 "die. It continues to give an enhanced value to the premises in the lessor's hands, though the lessee's interest has expired"(41). Later again, he said: "Nor is the license, as I think, in any true sense a part of the goodwill of the publican's business. Its existence is essential, no doubt, to the creation of such a goodwill because the business of the
30 "sale of intoxicants cannot lawfully be carried on without a license. Other connection between the license and the goodwill of the publican's business there is, so far as I can see, none"(42). In concluding his judgment, the learned Lord Justice said: "In my humble
35 "judgment, no sufficient reason has been adduced by the appellant in this Court for refusing to recognize the existence of the license as an element of value in property under s. 13 just as it is recognized in the valuation of licensed property under the law of rating, in the assessment of compensation under the licensing laws, and as in practice it is universally
"recognized in the property market"(43).

40 The case went to appeal to the House of Lords under the name *Earl Fitzwilliam v. Inland Revenue Commissioners*(44), and the judgment of the Court of Appeal was upheld. *Lord Shaw of Dunfermline* adverted to the feature that, under the then existing legislation in England, the position of premises having a license is, as he phrased it, "that these
45 "premises, so to speak, are given a leverage in the matter of the continuation of such a license, which is of a solid and valuable character"(45). A similar legislative advantage pertains in New Zealand to premises already licensed. *Lord Moulton* expressed similar views in slightly different language. He said: "By purchasing the fee simple, the purchaser would become possessed of substantial advantages by reason of
50 "the existence of that license, and if it had been intended to exclude

(40) [1913] 2 K.B. 593, 603, 604.

(41) *Ibid.*, 604.

(42) *Ibid.*, 604.

(43) *Ibid.*, 605.

(44) [1914] A.C. 753.

(45) *Ibid.*, 760.

"the effect of those advantages upon the price which a willing buyer would give for the fee simple of the property, specific words would have been used to indicate that such was the intention of the Legislature" (46).

Reference can now be made to *Robinson Bros. (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment Committee* (47), which seems to have strongly influenced the Judge below. Nothing that was said in any judgment given in connection with that case has anything to do with the topic now under discussion. The effect of the case is exhausted when it is said that what was held in it was that the competition of applicants, including brewers, for licensed premises was a factor which should be taken into account in assessing the value of licensed premises, and that a proper assessment required that the higher rents which brewers would pay should be taken into account. Only incidentally is it mentioned that licenses must be taken into account when valuing public houses and the reason for so doing given (48). The fact of enhancement there recited, and the reason given for admitting it as a factor influencing value, are alike opposed to the ultimate conclusion reached by the learned Judge in the judgment under appeal. In a general sense, the whole judgment of the learned Lord Justice is equally so opposed. The case as a whole is a mere extension of *Cartwright v. Scolcoates Union* (49). It does not purport in any sense to deal with the topics the Judge in the Court below seems to have thought.

This is clearly demonstrated by the definition of *Lord Macmillan*, in the course of his speech in the House of Lords, of the point in issue in the case (50). There the learned Law Lord said: "It will be at once apparent that the real question at issue centres round the *Bradford* case ([1898] 2 Q.B. 630) and the principles there enunciated" (51).

The *Bradford* case (52) was concerned only with the question of the relevance of brewers' competition as an element in fixing value. Despite this, it can be said that in a general sense the conceptions implicit in the speech of *Lord Macmillan* are opposed to the conclusions of *Fleming, J.*, and more particularly in respect of its re-affirmation of the application of the principle that the valuation must be *rebus sic stantibus*. In that relation, the learned Law Lord said: "Nor, in taking into account the rent which a brewer would pay, is there any violation of the principle that the valuation must be *rebus sic stantibus*. It is precisely because the hereditament is a public house, and is to continue to be used as such, that it attracts the brewers' competition" (53).

It was from this phase of *Lord Macmillan's* speech that the learned Judge below ventured to differ, although *Lords Maugham, Atkin, Thankerton, and Russell of Killowen* all expressly concurred in and approved *Lord Macmillan's* opinion.

The cases which deal exclusively with the unity of particular premises and the goodwill attaching to them are consistent with the cases which either primarily or by express reference, deal with the effect of a license upon value. In *In re Kitchin, Ex parte Punnett* (54), *Jessel, M.R.*, said: "The question of goodwill has really not been argued. It is quite plain that the goodwill of a public house passes with the public house" (55).

(46) [1914] A.C. 753, 763.

(47) [1937] 2 All E.R. 298.

(48) *Ibid.*, 311.

(49) [1900] A.C. 150.

(50) [1938] 2 All E.R. 79, 81.

(51) *Ibid.*, 81.

(52) [1898] 2 Q.B. 630.

(53) [1938] 2 All E.R. 79, 86.

(54) (1880) 16 Ch.D. 226.

(55) *Ibid.*, 233.

In *Cooper v. Metropolitan Board of Works*(56), Cotton, L.J., in the course of a case which did not involve licensed premises, but, speaking by analogy, said: "The goodwill which attaches to a particular house increases the value of that house . . . If, for instance, there is a well-known public house, and, from its position being well-known, people frequent it, the goodwill attaches to the house and adds to its value"(57).

Reference to the opinions of the learned Law Lords who were party to the judgment of the House of Lords in *Inland Revenue Commissioners v. Muller and Co.'s Margarine, Ltd.*(58) is forborne, as each of the learned Law Lords postulated the sale, as a separate property, of the goodwill of the business in conjunction with the sale of the premises, but reference can properly be had to two cases adverted to by Lord Brampton in the course of his opinion. He said: "Dealing with an argument touching an injury to the custom of a public house, Lord Westbury in *Ricket v. Metropolitan Ry. Co.* ((1867) L.R. 2 H.L. 175, 204), says: 'It is a fallacy, almost a mockery, to answer, the custom is one thing and the house another; and the injury is to the custom, not to the house. You cannot sever the custom from the house itself, or from the interest of the occupier, for the custom is the thing appertaining to the house which gives it its special character, and constitutes its value to the occupier.' In short, it was observed by the Court of Exchequer, 'the goodwill is part of the value of the property.' The judgment of Lord Esher, M.R., in *Commissioners of Inland Revenue v. Angus* ((1889) 23 Q.B.D. 590), is to the same effect"(59).

I apprehend that the reference here made is to that phase of the judgment in the latter case in which the Master of the Rolls said: "The truth is that the goodwill of the business will pass to the purchasers not by this instrument, but as soon as the real estate to which the goodwill is attached has passed to them; the moment the real estate is conveyed to them the goodwill will pass to them"(60).

The unity of value created by premises and the goodwill of a business associated with them which is implicit in Lord Esher's judgment was expressly phrased by A. L. Smith, L.J., when *Muller and Co.'s Margarine, Ltd. v. Inland Revenue Commissioners*(61) was before the Court of Appeal. There, advertent to and distinguishing *Smelting Co. of Australia, Ltd. v. Inland Revenue Commissioners*(62), he said: "But the Court were dealing there with a purely personal right, and I do not think that they intended to exclude from the category of property having a local situation rights which, though not visible and tangible themselves, are nevertheless annexed to and inherent in certain other property which is"(63).

The judgment of Scrutton and Greer, L.JJ., in *Simpson v. Charrington and Co., Ltd.*(64) both accept the association of goodwill with premises as a factor influencing the value of the latter. In *Daniell v. Federal Commissioner of Taxation*(65), Sir Adrian Knox, C.J., expressed similar views. The learned Chief Justice said: "If . . . I am at liberty to express an opinion on the abstract question whether the goodwill of a licensed victualler's business is separable from the premises in which it is carried on, my opinion is that while it cannot be said to be absolutely and necessarily inseparable from the premises or to have no separate value, *prima facie* at any rate it may be treated as attached to the

(56) (1883) 25 Ch.D. 472.

(57) *Ibid.*, 479.

(58) [1901] A.C. 217.

(59) *Ibid.*, 232.

(60) (1889) 23 Q.B.D. 579, 594.

(61) [1900] 1 Q.B. 310.

(62) [1897] 1 Q.B. 175.

(63) [1900] 1 Q.B. 310, 319.

(64) [1934] 1 K.B. 64.

(65) (1928) 42 C.L.R. 296.

"premises and whatever its value may be should be treated as an enhancement of the value of the premises" (66).

As pointed out by *Sir Michael Myers, C.J.*, in *Heel v. O'Neill* (67), there are two Scottish cases in which it is held that goodwill is an element to be taken into consideration in estimating the annual value of the premises for the purposes of the sixth section of the Valuation of Land Act, 1854 (Eng.). These two cases conform to the cases as to goodwill already mentioned, as well as to such others as are mentioned in the same relation by *Sir Michael Myers, C.J.*, in *Duncan v. Mackie* (68).

These cases all indicate the unqualified acceptance over many years of an enhancement due to the existence of a license and to the goodwill associated with the premises.

The consensus of judicial opinion on the question of enhancement invites consideration as to whether those decisions have any application in New Zealand. If they have, then they are authoritative, and must be followed. They will only have application if the relative legislation is indistinguishable in effect. Some of the English decisions depend upon the prescription of the Parochial Assessments Act, 1836, as affected by the Poor Rate Exemption Act, 1840. As has been said, the measure of rateable value is there laid down as:

the rent at which the same might reasonably be expected to let from year to year free of all the usual tenant's rates and taxes.

Such as do not come within the ambit of that statutory enactment come under the Rating and Valuation Act, 1925, which is not materially different. With respect to the latter Act, in relation to its definition of "gross value," *Lord Macmillan in Robinson Bros. (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment Committee* (69) said: "The Rating and Valuation Act, 1925, s. 68 (1), defines 'gross value' to mean 'the rent at which 'a hereditament might reasonably be expected to let from year to year,' on certain assumptions immaterial for the present purpose It is the rent which a hypothetical tenant might reasonably be expected to pay" (70).

That these two definitions do not materially differ was held by this Court in *Dunedin City Corporation v. Young* (71). In the judgment of *Sir Michael Myers, C.J.*, *Blair and Callan, J.J.*, delivered by the Chief Justice, a discussion of the topic contains the statement: "On that basis [i.e., that the rateable value is the equivalent of the hypothetical 'net annual return to the owner of the property as an investment], 'net annual rent,' 'fair annual value,' and 'rateable value' are in meaning interchangeable, and are, indeed, in the statutes of various jurisdictions used indiscriminately. The result may be obtained in various ways, but the underlying scheme or idea is the same" (72).

Later, the comparative identity between s. 68 of the Rating and Valuation Act, 1925 (Eng.), and the relative provisions of our Rating Act is again mentioned (73). This being so, it is impossible to escape the conclusion that the authorities quoted in relation to the Parochial Assessments Act, 1836, and the Rating and Valuation Act, 1925, apply in New Zealand. It follows, unless compelling authority is to be disregarded, that any enhancement of value attributable to the existence of a license and the existence of a goodwill attached to the premises should be taken into account by a valuer in assessing the rent mentioned in para. (a) of

(66) [1928] 42 C.L.R. 296, 302, 303.

(67) [1933] N.Z.L.R. 319, 329.

(68) [1940] G.L.R. 226, 230.

(69) [1938] 2 All E.R. 79.

(70) *Ibid.*, 84, 85.

(71) [1941] 4 N.Z.L.G.R. 72, 77, 78.

(72) *Ibid.*, 78.

(73) *Ibid.*, 80.

the definition of rateable value in s. 2 of our Rating Act, 1925. Any contrary conclusion would conflict with what Lord Macmillan in *Robinson Bros. (Brewers), Ltd. v. Houghton and Chester-le-Street Assessment Committee* (74) defined as "the principle that the valuation must be
 5 "rebus sic stantibus" (75). To adapt the language of the learned Law Lord, it is precisely because the hereditament is a public house, and is to continue to be used as such, that it is to be valued as a public house, and not as a mere assemblage of bricks and mortar. This necessarily postulates that the value is to be assessed upon the assumption that all
 10 conditions—such as the possession of a license—are fulfilled which will enable the premises to be used by the hypothetical tenant as they are at the date of valuation being used.

This must be so, for the rent the hypothetical tenant will pay is merely the measure by which the value of the existing occupation is measured,
 15 and the existing occupation is in respect of licensed premises. Authority for these views is found in the speech of Lord Buckmaster in *Poplar Assessment Committee v. Roberts* (76), where he said: "But although the tenant is imaginary, the conditions in which his rent is to be determined cannot be imaginary. They are the actual conditions affecting
 20 "the hereditament when the valuation is made" (77). That this involves valuing the premises as licensed premises if they are licensed is made certain by his use of the language subtended: "It is in respect of his occupation that the rate is levied, and the standard in the Act [i.e., the "Valuation (Metropolis) Act, 1869] is nothing but a means of finding
 25 "out what the value of that occupation is for the purposes of assessment" (78). That, in effect, is to say that what is sought is the value of the occupation of licensed premises, and that value must be ascertained by assuming an occupation in a particular way of the same character as available for disposition.

The same conception inspires the speech of Lord Atkinson in the same case, where he said: "What the ratepayer is, under both the Act of
 30 "1836 and that of 1869, rated in respect of is decided by many cases in this House to be the beneficial occupation of a hereditament" (79). After referring to the measure of the value to be assessed, he said: "It is
 35 "to be applied to the hereditament, no doubt, *rebus sic stantibus*, but this rent is merely a notional or speculative thing" (80).

The same thought is implicit in that part of the speech of Lord Maugham in *Townley Mill Co. (1919), Ltd. v. Oldham Assessment Committee* (81), where he said: "But the hypothetical rent which the tenant
 40 "could give was estimated with reference to the hereditament in its actual physical condition (*rebus sic stantibus*) and a continuance of "the existing state of things was *prima facie* to be presumed" (82).

A perhaps more explicit indication that the valuation has to be made upon the assumption that the premises will continue to be licensed premises is given in the judgment of Lord Wright in *Appenrodt v. Central Middlesex Assessment Committee* (83). He there said: "The justices' license is essential to give the premises the status necessary to enable
 45 "a licensed victualler's business to be carried on. The rent is paid for "the occupation of licensed premises; the landlord has to provide
 50 "the premises for the tenant; that is, he has to provide the ground,

(74) [1938] 2 All E.R. 79.

(75) *Ibid.*, 86.

(76) [1922] 2 A.C. 93.

(77) *Ibid.*, 103.(78) *Ibid.*, 104.(79) *Ibid.*, 107.(80) *Ibid.*, 107.

(81) [1937] A.C. 419; [1937] 1 All E.R. 11.

(82) *Ibid.*, 437; 19, 20.

(83) [1937] 2 K.B. 48 [1937] 2 All E.R. 325.

"the building, landlord's fixtures and so forth; all these enter into the value on which rent is payable"(84). After enumerating what he termed the "intangible elements of value"(85), he said: "These elements are all constituents on which the gross value is ascertained under the notional tenancy from year to year of the statutory hypothetical tenant"(86). 5

Smith, J., in *West Middlesex Waterworks Co. v. Coleman*(87) is emphatic. He says: "'Annual value' means annual value of the house as it stands and as it is occupied, viz., as a public house with a license"(88).

These authorities all show that, in assessing the value of the occupation of licensed premises, the annual rental must be assessed upon the assumption that they will continue as licensed premises and are available to the hypothetical tenant as such. The conclusion that enhancement is to be taken into account has the merit of conforming to common sense, in that to value licensed premises as though not licensed is to assume the abstraction of the very element which attributes to them their true value. This would operate to disrupt the equality of contribution upon the basis of relative values which it was the purpose of the Rating Act to establish. 10 15

The cases on which the respondent relied have no application. In *Cox v. Harper*(89), the question was whether the particular annual sum which, in addition to the rent, was to be paid for the goodwill of the business and for the use of the facilities and fittings upon the premises, was or was not rent. *Cozens-Hardy, M.R.*, held that, having regard to the terms of the contract, the additional payment was not rent. The judgment of *Lord Buckley* is founded upon a similar view. Equally, in *re Joseph*(90), *In re Gilmer, Public Trustee v. Commissioner of Stamp Duties* (91), and *Toohy's, Ltd. v. Valuer-General*(92) are explicable upon the basis which is fully explained in the judgment of *Lord Dunedin* in the latter case—that is, that enhancement cannot attach to premises when, by the very wording of the constating statute, the buildings and improvements to which alone they can attach are to be hypothetically considered as non-existent, and because the definition of improvements is too precise and rigid to allow of the introduction of any enhancing effect attributable to a license or goodwill. 20 25 30 35

It follows that the judgment of the Court below enunciates a fallacious principle. Questions 3 and 4 must therefore be answered:

The defendant and its valuer are entitled to treat and envisage the said premises as premises which will continue to be licensed and as premises to which a goodwill in respect of the business therein conducted attaches if in fact any such goodwill does attach but no regard may be paid to any goodwill which is personal in character. 40

The appellants are allowed their costs upon the higher scale as from a distance. 45

Needless to say, nothing said in this judgment is intended to, nor can it in any way, qualify or vary the effect of the judgment of *Dunedin City Corporation v. Young*(93). 50

(84) [1937] 2 K.B. 48, 56; [1937] 2 All E.R. 325, 329.

(85) *Ibid.*, 56; 329.

(86) *Ibid.*, 56; 329.

(87) (1885) 14 Q.B.D. 529.

(88) *Ibid.*, 538.

(89) [1910] 1 Ch. 480.

(90) (1905) 25 N.Z.L.R. 225.

(91) [1929] N.Z.L.R. 61.

(92) [1925] A.C. 439.

(93) (1941) 4 N.Z.L.G.R. 72.

GRESSION, J. I have had the advantage of reading the judgment of Kennedy, J.(1), with which I am in agreement, and concur therewith accordingly.

Appeal allowed.

Solicitors for the appellants: *Ramsay, Haggitt, and Robertson* (Dunedin).
Solicitors for the respondent: *Neill, Ross, and Meade* (Dunedin).

(1) *Ante*, p. 364.

[IN THE SUPREME COURT AND IN THE COURT OF APPEAL.]

CAMERON v. THE KING.

SUPREME COURT. Wellington. 1947. September 1. CHRISTIE, J.

COURT OF APPEAL. Wellington. 1948. March 11; May 25. SIR HUMPHREY O'LEARY, C.J.; SMITH, J.; KENNEDY, J.; FINLAY, J.; GRESSION, J.

Public Works—Proclamation—Landlord and Tenant—Rent Restriction—Land purchased by and vested in Crown by Proclamation—Part occupied by Tenant—Tenant at date of Proclamation a Statutory Tenant—Tenant remaining in Occupation and paying Rent to Crown—Crown using Land for Storage of Heavy Material—Inconvenience and Interference with Tenant's Privacy—Breach of Covenant for Quiet Enjoyment—Damages—Statutory Protection given by Fair Rents Act, 1936—Whether an "estate or interest" and, as such, discharged by Proclamation taking Land occupied by Statutory Tenant—Public Works Act, 1928, ss. 22, 23, 32—Fair Rents Act, 1936, ss. 2, 13.

The Crown, for the Public Works Department, purchased (apparently under s. 32 of the Public Works Act, 1928, as the conditions prescribed by ss. 22 and 23 of that Act were not complied with) a section of land, upon which there was, *inter alia*, a cottage, occupied, with some of the vacant land adjoining, by the appellant under a tenancy with no agreement as to its duration. Before the date of the Proclamation, this tenancy had been terminated by notice. Subsequently, the appellant was allowed to continue in occupation for about two years, and, for that period, he paid rent to the Public Trustee as agent for the Public Works Department.

The Department dumped a considerable amount of material for outdoor storage, during the war, upon the land close to the cottage, causing the appellant inconvenience and some slight interference with his privacy and comfort. He claimed damages for the deprivation of the full use of the land in breach of the implied covenant for quiet enjoyment.

It was held by *Christie, J.* (*post*, p. 385), that the suppliant had not established any claim to a tenancy of the land, and that any use by the Department had not infringed his rights. On appeal from that determination,

Held, by the Court of Appeal, 1. That the tenancy which the appellant had, after the expiry of the notice to quit, was under the statutory protection given by the Fair Rents Act, 1936, commonly called "a statutory tenancy," or under a new tenancy entered into with the Public Works Department, identical with the former tenancy; and that either tenancy conferred a right to quiet enjoyment, the invasion of which entitled him to damages.

Morrison v. Jacobs(1), *Levy v. Kesry*(2), and *Player v. Boughtwood*(3) referred to.

Semble, in the case of a purchase of land by the Crown under s. 32 of the Public Works Act, 1928, the statutory protection under the Fair Rents Act, 1936, which binds the Crown, applies.

Quære, Whether the provision of s. 23 of the Public Works Act, 1928, that the land specified in the Proclamation should be vested in the Crown in fee simple discharged from all estates or interests in the land, operates to extinguish the statutory protection, which is properly not an estate or interest at all, under the Fair Rents Act, 1936, which binds the Crown.

Appeal from the judgment of *Christie, J.*, *post*, p. 385, allowed, and £30 damages awarded.

(1) [1945] 2 All E.R. 430, 432.

(2) [1945] N.Z.L.R. 209.

(3) [1946] G.L.R. 65.

PETITION OF RIGHT in which the suppliant claimed £100 as damages for a breach of the implied covenant for quiet enjoyment of a tenement.

The suppliant alleged that at all material times he had been the monthly tenant of the Public Works Department in respect to a house situated at and known as 81A Thorndon Quay, Wellington, and of the land appurtenant thereto. During a period of twelve months, the servants of the Public Works Department had dumped timber and other material upon the land, including heavy packing-cases containing machinery; and, during the same period, the Department had given authority, permission, or approval to other persons—namely, Morgan and Flowers, wood and coal merchants, and Kenneth Wilson, builder—to trespass upon the land and use it as a means of access between Thorndon Quay and adjoining land, and to stack timber and other materials upon it. In spite of requests made to the Public Works Department, its servants and Morgan and Flowers and Kenneth Wilson had refused or neglected to remove or procure the removal of such timber, machinery, and materials and to cease such trespass, and had thereby deprived the suppliant and his family of the full use of the land in breach of the implied covenant for quiet enjoyment of it existing between the suppliant and the Public Works Department.

The respondent denied the creation of any monthly tenancy as alleged; and, if there had been such a tenancy, it was determined by a proper notice to quit given to the suppliant in writing by or on behalf of the landlords, Grayburn and Chalmers, which notice expired on May 20, 1944, and, thereafter, although the suppliant remained in possession of No. 81A, he did so merely by virtue of his rights under the Fair Rents Act, 1936. By virtue of a proclamation under the Public Works Act, 1928, published in 1944 *New Zealand Gazette* on June 29, 1944, the whole of the land was taken for public works, and by virtue of s. 23, became absolutely vested in fee simple in the respondent discharged from all mortgages, charges, claims, estates, or interests of every kind for the public use as from and after June 29, 1944, the day named in the proclamation.

On June 30, 1944, the Crown alleged, the respondent was in actual possession of all land in respect of which the suppliant claimed to be a monthly tenant other than the land on which the cottage known as 81A actually stood, and the respondent had remained in possession thereof ever since; and since that date the suppliant had been pressed on behalf of the respondent to vacate the cottage 81A, which was in a dilapidated condition, so that it could be demolished; but, as the suppliant was unable to find other accommodation, he asked for, and was given, permission on behalf of the respondent to occupy the cottage until he found other accommodation, but such permission did not include the right to occupy any land outside of the cottage. The respondent, in giving authority to Morgan and Flowers and Kenneth Wilson to make use of certain land, was lawfully exercising the respondent's right as an owner thereof in fee simple free of encumbrances. The respondent denied that the entry by Morgan and Flowers and Wilson in pursuance of the respondent's authority constituted a trespasser or infringed any rights of the suppliant; or that at any time since June 29, 1944, the suppliant had had any tenancy of any kind of the land referred to or any lawful possession of it; but, on the contrary, the respondent said that since that date the respondent, or persons with the authority of the respondent, had been in lawful possession.

The facts, as taken from the judgment of the Court of Appeal, were as follow:

The Crown, for its Public Works Department, acquired for £2,900 a piece of land comprising approximately 1 rood on Thorndon Quay, and settled the purchase on May 9, 1944. Upon the property were three cottages known as Nos. 81, 81A, and 83A. The cottage known as No. 81 had a frontage to Thorndon Quay and was completely fenced; alongside it ran a strip of land giving access to the two other cottages at the back. Number 83A had an old, dilapidated fence right round it, and No. 81A stood in the back corner of the land some way behind and to the side of No. 83A. At the time the Crown acquired the property, the appellant was a tenant of the cottage No. 81A. The only evidence as to the nature and term of his tenancy was his statement that in 1943 he interviewed the agents for the owners and got a tenancy at 15s. per week, with no agreement as to its duration; he claimed that the fact that there was considerable vacant land was an attraction, as he had been a professional gardener and as well had a motor-car.

A firm of solicitors acting for the owners of the property wrote to appellant on April 20, 1944, intimating that the property had been sold to the Public Works Department and giving notice terminating the tenancy at the expiration of a month. This was followed by a letter, dated April 27, from the Public Works Department:

With reference to your recent interview with me, I have to advise that this property is urgently required for Departmental purposes.

I shall be pleased, therefore, if you will make arrangements to vacate not later than May 20, 1944, the expiry date of the notice already served upon you by Messrs. Bunny and Gillespie.

And a further letter, dated May 11:

83A THORNDON QUAY.

Further to my letter of 27th ultimo, I have to advise that ownership of the above property passed to the Department on 9th instant.

The notice of termination of your tenancy as given to you by the previous owners' solicitors still stands and I shall be pleased to know that you are vacating by May 20.

Rental will, of course, be payable by you to this Department from May 9, 1944, to May 20, 1944, unless you vacate prior to the latter date, in which case rental will be accepted up to the date you actually vacate.

Please pay the rent to the District Public Trustee, who acts as this Department's agent in such matter, or to his collector.

Appellant on May 15 replied as follows:

Regarding your letter of May 11, I'm sorry to state that to date I have not been able to obtain another bach, &c., although I have made many attempts, &c., and also applied for some, even enclosing stamped addressed envelopes for replies, but have not received any. I hope I'll be able to find such another bach as soon as possible and hope that I'll not cause any inconvenience should I stay here a little longer.

On May 22, 1944, appellant paid to the Public Trust Office £1 10s. A rent-book in common form was issued deleting the section of the Public Trust Office Act printed thereon, presumably as only applicable to tenancies from the Public Trustee. The details filled in expressed the rental to be "15s. p.w.," the tenement "dwg.," the rent payable "weekly," and the date from which rent payable "from and including May 9." The book had some "Conditions of Tenancy" printed thereon, but there was no evidence that appellant ever assented to these conditions of tenancy or to any change in the nature of his tenancy. Thereafter, the appellant continued to pay rent until June 12, 1946. The Public Works Department required the land as a parking-place for stores and began on May 19 to deposit material, but the evidence did not show where such material was first placed. Appellant stated that at any

rate in May he was able to turn his truck round in front of the cottage. Later, No. 83A was demolished and the fence around it removed. The appellant married in July, 1945, and took his wife to reside in the cottage with him. Thereafter, according to him, more and more material was brought and dumped. In October, 1945, he brought home some motor-cases and put them alongside the cottage, to find a few days later they had been moved and in their place were several Public Works Department cases of large dimensions. The dumping of material continued until appellant had only a piece 2 ft. wide alongside the house for garden (and that was run over by the wheels of motor-lorries), actual access on foot to the cottage was, he said, at times interfered with, the stacking of timber made the front room dark, and in June, 1946, when a doctor was called to appellant's wife, the front doorway was blocked by timber which it was necessary to step over. Appellant's wife had given evidence that men outside her bedroom window stacking timber had affected her privacy, that the living-room had been made dark, and that it had at times been necessary to hurdle timber laid across the path.

The witnesses called for the Crown did not deny the dumping of material; they said the position in the Department as regards bulk outdoor storage was acute to meet the needs of the Armed Forces. The appellant was asked from time to time if he could vacate. The officer of the Legal and Proclamation Branch of the Public Works Department (Gormack), called, stated that:

The Department at that time would have been pleased had he given up possession as long as we understood he was endeavouring to get other accommodation. . . . The Department continued to use the land until some months in 1945. The American demand for accommodation slackened and storage space became available some time in the middle of 1945. That eased the position for my Department considerably.

According to him, a firm of Morgan and Flowers had sought to have the use of the land, and a tenancy was granted to them in the following terms:

- (1) The tenancy to be on a monthly basis commencing on September 1, 1945.
- (2) Rent to be at the rate of £2 per week, payable to the District Public Trustee, Wellington.
- (3) Mr. Cameron, the tenant of the old house at the rear of the property, to have his right of access to that house reserved at all times through the land to be occupied by you.
- (4) Rates to be paid to the Department.
- (5) No gates to be erected by you except with the prior consent and approval of the Department.

The officer stated also that the Department made no further request to appellant to quit after September 15, 1944, that he himself only saw appellant once, and, in answer to a question as to whether there was any reference at all to the fact that appellant was to occupy the cottage only, and not to use the land, said, "As far as I remember the land was never mentioned at all." On re-examination, he thought it might have been—later. When confronted with photographs which showed timber and packing-cases within a few feet of the cottage, he said he thought that was reasonable if a path were left for appellant and his wife to walk into the house.

Cresswell, for the suppliant.

W. H. Cunningham, for the respondent.

CHRISTIE, J. (orally). It is unnecessary for me to reserve my decision in this case. I find that the suppliant has not established any claim to a tenancy of the land apart from the cottage, and that any use by the Department of the land has not amounted to an infringement of the suppliant's rights. Judgment for the respondent accordingly, with costs on the lowest scale.

From the whole of the foregoing judgment, the suppliant appealed.

In the Court of Appeal,

Cresswell, for the appellant. A. In so far as the judgment may have been based by the learned trial Judge on the facts, it could not have turned on the credibility of witnesses, because the material facts on which the suppliant relied were undisputed.

This Court is in as good a position as the learned trial Judge to draw the proper inferences from the undisputed facts: *McFarland v. Stewart* (1). These facts are: (a) the original material tenancy and its extent; (b) the receipt of rent by the Public Trustee as agent for the Public Works Department for over fifteen months up to November, 1945; and (c) the use of the land by the Department and its tenants. The following facts are material to the question whether or not there was any modification in the terms of the original tenancy in respect of the land comprised in the tenancy; the interview between the suppliant and Gormack, an officer in the legal branch of the Department; the correspondence and the Proclamation of June 29, 1944, under the Public Works Act, 1928; the user of the land and its extent in the early stages of the Crown's ownership. Only on the last-mentioned is there any dispute, and that is not material.

B. The proper inferences from those facts were that the suppliant, from November 8, 1945, to November 8, 1946, was a tenant of the Crown; and, further, that the tenancy included not only the cottage, but also the land.

There was a tenancy in May, 1945. The Crown is bound (s. 4) by the Fair Rents Act, 1936. When the notice to quit was given by the previous owner, the appellant was entitled to occupy under the Fair Rents Act, 1936, until an order for possession was made, and, in the meantime, he had the same rights as he had under his contractual tenancy. If the then statutory tenancy was ended by the Proclamation of June 29, 1944, as contended by the respondent, a new contractual tenancy was created by the issue of the rent-book, the payment and acceptance of rent for a lengthy period, and the fact that no further demand for possession was made after October, 1944. Acceptance of rent by a landlord is proof of a tenancy: *Levy v. Kesry*(2); and, even if the rent be accepted without prejudice after the expiry of a notice to quit, it is evidence of a new tenancy. The exception is the receipt of rent when a tenant has a statutory right of possession and rent was accepted pending proceedings for possession, as in *Sue Sing v. Smith*(3) and *Davis v. Bristow*(4). Even the acceptance of rent for a long period, in such a case, may cause a fresh contractual tenancy to be implied(5). The respondent apparently relied on the Proclamation, which, it contends, put an end to any tenancy, contractual or statutory. If the old tenancy were ended by the Procla-

(1) (1900) 19 N.Z.L.R. 22, 32.

(2) [1945] N.Z.L.R. 209.

(3) [1922] N.Z.L.R. 437.

(4) [1920] 3 K.B. 428.

(5) *Ibid.*, 437, 438.

mation, the Crown did not have an excuse to accept rent (as in the two last-named cases), and its acceptance of rent created a new tenancy, possibly a weekly one. If the tenancy were not ended by the Proclamation, then, by November, 1945, the continued acceptance of rent, coupled with the issue of the rent-book, amounted to a fresh agreement for a tenancy indefinite in its duration; and a contractual tenancy continued from that date. Alternatively, if the tenant, at that date, was still a statutory tenant, he had, in view of the effect of the Fair Rents Act, 1936, the same rights in respect of undisturbed possession as a contractual tenant.

C. As a tenant, the suppliant was entitled in law to the benefit of the implied covenant for quiet enjoyment. The tenancy included not only the dwelling, but also the land mentioned in para. 1 of the statement of claim; and any subsequent tenancy should be held to be identical in extent with the original tenancy in respect of the same land, since there was no agreement. The correspondence contains nothing to the contrary; and there was no oral evidence on the point. The arrangement was suggested by the Department. The whole of the circumstances must be taken into account. Even if, as suggested by the Department, the appellant was entitled to no more than the use of the house and access to it, there has been interference with these. Alternatively, the tenancy included the dwelling, sufficient land for its use, and sufficient access, and if the appellant acquiesced in the Crown's use of the land after May, 1944, his acquiescence did not amount to any abandonment of his legal rights.

D. As the conduct by the Crown amounted in law to breaches of the covenant if it existed, and was undisputed, the appellant is entitled to damages.

[FINLAY, J. What kind of tenancy do you suggest the suppliant had?]

A statutory tenancy giving the suppliant a right to continue under the Fair Rents Act, 1936, on the terms of the contractual tenancy.

A covenant for quiet enjoyment is implied in every tenancy: *Woodfall on Landlord and Tenant*, 24th Ed. 620, 621, and *Hill on Landlord and Tenant*, 9th Ed. 154. There was a clear breach of that covenant: *20 Halsbury's Laws of England*, 2nd Ed. 243; and the Crown is in no better position than a private landlord. Even if the appellant had only the benefit of the arrangement that the Crown admits, he is still entitled to damages for interference with his enjoyment of the house and its access.

W. H. Cunningham, for the Crown. The substantial questions of fact are: What was the extent of the appellant's tenancy? Did he ever occupy anything more than the cottage? Was he ever in possession of the land on which he claims that the Crown trespassed? Alternatively, did he not accept a fresh occupancy from the Crown after June 29, 1944, of the cottage without the land?

The appellant continued to pay rent up to June, 1946, and made no complaint as to any interference with the land or any application for a reduction of rent. His conduct is inconsistent with his having had the right to possession of the vacant land, which he later claimed. The actual tenancy given to the suppliant is shown as commencing in May, 1944. Under s. 23 of the Public Works Act, 1928, the Proclamation of June 29 (1944 *New Zealand Gazette*, 829) has the effect of discharging from all charges, claims, estate, or interests whatsoever the land described in it: *Stevens v. Carterton Borough* (6).

[FINLAY, J. How far does that action override a right given to a tenant under another statute ?]

The Fair Rents Act, 1936, does not impliedly repeal s. 23 ; and the public interest must be predominant over private interests : *The King v. Wilson*(7). After the tenancy was extinguished by operation of law on the gazetting of the Proclamation, there was a new tenancy, limited to the cottage with right of access : see the letter of August 15, 1945(8). That tenancy is not on the same terms as the original tenancy. The tenant was in the cottage when the land was made the subject of a rubbish-dump, and the depository of 45 tons of heavy bridge timber ; and he must be assumed to have paid rent in terms of a rent-book expressed to be for the dwelling, and as accepting the dwelling as he found it.

Cresswell, in reply. There is a distinction between Proclamations under ss. 22 and 23 of the Public Works Act and those under s. 32 (which deals with the taking of an estate or interest after agreement with the owner of the property). Here, the reversion of the land only has been taken over from the previous owner by the Proclamation : see s. 32 (6) as it is subject to the appellant's statutory tenancy, which still bound the Crown notwithstanding the Proclamation. The rent was paid to the District Public Trustee as agent ; but he cannot alter a statutory tenancy merely by giving a rent-book stated to be for a "dwelling," and no more.

Cur. adv. vult.

The judgment of the Court was delivered by

GRESSON, J. [After stating the facts, as above(1) :] Upon these facts, appellant, as suppliant, had claimed a breach of an implied covenant for quiet enjoyment. Respondent had pleaded in answer (*inter alia*) :

1. That, if suppliant had any monthly tenancy as alleged, it had been determined by a proper notice to quit, and that thereafter he had remained in possession merely by virtue of the Fair Rents Act.
2. That by Proclamation dated June 29, 1944, the whole of the land was taken for Public Works, and, by virtue of s. 23 of the Public Works Act, 1908, became absolutely vested in the respondent, discharged from all estate or interest of any kind.
3. That the suppliant was pressed to vacate, but, as he was unable to find other accommodation, he sought and was given permission to occupy the cottage until he found other accommodation, but such permission did not include the right to occupy the land outside of the cottage.
4. That in giving authority to Messrs. Morgan and Flowers and to K. Wilson to make use of the land the respondent was lawfully exercising his right as owner, and denied that the entry by the latter infringed any rights of the suppliant.
5. That since June 29, 1944, the suppliant had not had any tenancy of any kind in the land or any lawful possession thereof.

Upon the facts, this much at least is clear—namely, that, when the Crown acquired the property by a purchase which it settled on May 9, 1944, there was at that time subsisting appellant's tenancy of no fixed

(7) (1941) 2 M.C.D. 96.

(8) *Ante*, p. 384, l. 33.

(1) *Ante*, p. 383, l. 1.

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term, and therefore a monthly tenancy. It must, too, be taken to have comprised, as well as the cottage, some of the surrounding land, as the only evidence as to the nature of the tenancy is that of appellant, and that implies that the agreement was for land as well as the cottage; a tenancy of a cottage only without land would be so unusual as to require cogent evidence to establish it, and this is lacking. This tenancy had, however, been determined by notice to quit given April 20, 1944, expiring May 20, 1944, when the appellant would become what has come to be called "a statutory tenant," but what is in truth no tenancy at all, but merely a statutory protection. When, on May 22, 1944, the notice having expired, the Public Trustee accepted an amount that constituted rent for more than the unexpired portion of the tenancy, it must be deemed a payment in recognition of, and referable to, the statutory tenancy. The Public Trustee constituted agent only to collect rent. The Departmental Officer said, in this connection :

The position was that the Public Works had more work than their staff could cope with, and handed over the collection of rents to the Public Trustee. It applies only to collection of rentals and advertising of vacant premises. I know of no agreement with the Public Trustee to enter into a weekly tenancy with Mr. Cameron .

There is nothing from which to infer the creation of a new tenancy or a variation of the old tenancy. Payment and acceptance of rent in such circumstances do not constitute a waiver of the notice or create a new tenancy, but are referable to the statutory tenancy, or, more correctly, the statutory protection which the landlord is powerless to terminate. As *MacKinnon, L.J.*, said in *Morrison v. Jacobs*(2): "At common law if the landlord has acquired a right to claim possession against his tenant and instead of exercising that right he allows him to remain in the house and accepts rent from him as before, the parties by their conduct may with reason be held to have entered into a new contract of demise. But the essential factor in those circumstances is that the landlord voluntarily abstains from turning the tenant out. When the tenant remains in possession, not by reason of any such abstention of the landlord but because the Rent and Mortgage Restriction Acts deprive the landlord of any power of intervention, no such inference can properly be drawn. That is the basis and the very obvious and cogent basis of the decision in *Davies v. Bristow* ([1920] 3 K.B. 428)"(3).

It was, however, pleaded by the respondent that, when by proclamation on June 29, 1944, the whole of the land in the certificate of title was taken for Public Works under the Public Works Act, 1928, by virtue of s. 23 of the Act the land became absolutely vested in fee simple in the respondent, discharged from all estate or interest of any kind. It may be said in regard to this contention, first, that the Proclamation appears to have been made under s. 32, not under s. 23, since the conditions prescribed by ss. 22 and 23 had not been complied with, and that it is at least doubtful whether under s. 32 there is any such discharge from existing interests; secondly, that even the express terms of s. 23 may not operate to extinguish a statutory tenancy, which is properly not an estate or interest at all, but a statutory protection; and, in the case of s. 32, at any rate, which is the case of a purchase, not a taking, by the Crown, there seems no reason why the statutory protection a tenant enjoys under an Act which binds the Crown should not apply. It is not necessary, however, to express any final opinion upon these questions, because either the statutory tenancy continued unaffected or, if it was extinguished, accep-

(2) [1945] 2 All E.R. 430.

(3) *Ibid.*, 432.

tance of "rent" thereafter from one who had no status at all would operate to create a fresh tenancy: *Levy v. Kesry*(4) and *Player v. Boughtwood*(5). Payment of rent connotes a tenancy. But whether the tenancy appellant had was under a statutory tenancy continuing since the notice to quit
 5 or under a new tenancy entered into with the Public Works Department identical with the former tenancy is unimportant. It was clearly either the one or the other, and conferred a right to quiet enjoyment.

The respondent, however, as well as contending that the tenancy from the beginning was of the cottage only, sought in the alternative to
 10 show that such a tenancy or right of occupation as appellant had from the Public Works Department was so limited. But, in our opinion, this plea is not established. The appellant states definitely, "There
 15 "was no agreement whatever that I should use the cottage only." The Departmental officer does not depose to any such arrangement. Though no doubt the Public Works Department desired appellant's occupation to be limited to the cottage, any assent by him to deprivation of the land is not proved. There was no "break" of any sort in the record of rent payments, and, had it been agreed to, a contract for a tenancy of less than had been enjoyed hitherto, but at the same rent, would have
 20 contravened the provisions of the Fair Rents Act as constituting an increase of rent. There may in the earlier stages have been some acquiescence by appellant to the dumping of material which, it must be remembered, related to the conduct of the war, but it is not clear at what stage the land in appellant's tenancy was invaded. The evidence as to a
 25 tenancy limited to the cottage only is insufficient and inconclusive.

As appellant's rights to quiet enjoyment were to some extent invaded, he is entitled to some damages, but in the early stages, at any rate, the damage (if any) was negligible. It was war material that was being stored; it began the month before the Normandy landing; there was little (if any)
 30 protest from appellant before his marriage; and at no time did he suffer more than inconvenience, and some slight interference with privacy and comfort. Upon this view, we think the sum of £30 is sufficient as damages. As regards costs, we allow appellant costs in the Supreme Court as per scale on the amount awarded, with witnesses' expenses and disbursements
 35 to be settled by the Registrar, and costs of the appeal according to scale.

Appeal allowed.

Solicitors for the appellant: *D. M. Findlay and Foot* (Wellington).

Solicitors for the Crown: *Luke, Cunningham, and Clere* (Wellington).

(4) [1945] N.Z.L.R. 209.

(5) [1946] G.L.R. 65.

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[IN THE SUPREME COURT AND IN THE COURT OF APPEAL.]

RIX v. CONTROLLER AND AUDITOR-GENERAL.

SUPREME COURT. Wellington. 1948. June 1, 11. FAIR, J.

COURT OF APPEAL. Wellington. 1948. June 25; July 30. SIR HUMPHREY O'LEARY, C.J.; KENNEDY, J.; CORNISH, J.; STANTON, J.

Local Elections and Polls—Medical Practitioner engaged by Hospital Board to serve as a Member of the Staff under Contract of Service—“Employment” by Board—Not Disqualified for Election as Board Member—“Notwithstanding anything to the contrary in this or any other Act”—Local Elections and Polls Amendment Act, 1944, s. 10 (1)—Hospitals and Charitable Institutions Act, 1926, s. 23 (1) (e)—Local Authorities (Members' Contracts) Act, 1934, s. 3.

The word “employment” in s. 10 (1) of the Local Elections and Polls Amendment Act, 1944—which is as follows:

“Notwithstanding anything to the contrary in this or any other Act, “no person shall be incapable of being elected or appointed as, or of being “a member of, any local authority by reason of his employment by that “local authority.”

—must be given its ordinary meaning, a contract for personal service wherein the relationship of master and servant exists; so that, if employment is proved, the provisions of other statutes disqualifying the person employed from election or appointment must be disregarded.

Such employment exists between a Hospital Board and a member of its medical staff where the engagement of the latter is the subject of a written agreement whereby the former agrees to employ the latter and the latter to serve the former as one of its medical staff for a period (and the former agrees to pay the latter a salary at a certain rate per annum), and which contains a clause requiring the latter during this period of his employment:

“to fulfil obey and comply with all by-laws rules and regulations of the Board and with the lawful orders and directions of the Board and of all “persons duly authorized by the Board and to keep such records as the “Board may require him to keep.”

In re Blund Brothers and Inglewood Borough Council (No. 2)(1), Heydon's Case(2), and Christie v. Hastie, Bull, and Pickering, Ltd.(3) applied.

Once such a practitioner is found to be in the employment of such a Board, the provisions of the Local Authorities (Members' Contracts) Act, 1934, or of any other statute, disqualifying him from election or appointment as a member of a Hospital Board—e.g., as “a person who holds any office or place of profit “under or in the gift of the Board”—are nullified by the opening words of s. 10 (1) of the Local Elections and Polls Amendment Act, 1944.

Lindsey County Council v. Marshall(4) applied.

Hillyer v. St. Bartholomew's Hospital (Governors)(5) distinguished.

Per Kennedy, J., That there is room for the operation of the words of disqualification retained in s. 23 (1) (e) of the Hospitals and Charitable Institutions Act, 1926, if the office or place of profit under or in the gift of the Board does not lie in employment in the service of a Hospital Board.

(1) [1920] V.L.R. 522.

(2) (1584) 3 Co. Rep. 7a; 76 E.R. 637.

(3) [1921] N.Z.L.R. 1.

(4) [1937] A.C. 97; [1936] 2 All E.R. 1076.

(5) [1909] 2 K.B. 820.

ORIGINATING SUMMONS for an order that the agreement bearing date July 31, 1947, made and subsisting between the plaintiff of the one part and the Wellington Hospital Board of the other part whereby the plaintiff was appointed as a member of the part-time staff of the Wel-

lington Hospital as anaesthetist constituted employment of the plaintiff by the Wellington Hospital Board within the meaning of s. 10 of the Local Elections and Polls Amendment Act, 1944, and that the plaintiff was not at the date of his election to the Board, and had not at any time since become, incapable of election to or membership of the Board by virtue of s. 3 of the Local Authorities (Members' Contracts) Act, 1934, by reason of the subsistence of that agreement; and that the receipt by the plaintiff of the fees (exceeding £25 in any financial year or £10 in any one instance) prescribed by the scale fixed by the Wellington Hospital Board for payment to visiting and/or part-time anaesthetists in respect of administering anaesthetics at the request of the Board at times outside the normal sessions or hours prescribed by the aforesaid agreement would not come within s. 3 of the Local Authorities (Members' Contracts) Act, 1934.

The facts were that on November 19, 1947, the plaintiff was returned as one of the representatives of the combined contributory district comprising Hutt City and the Borough of Eastbourne on the Wellington Hospital Board, being the Hospital Board constituted under the Hospitals and Charitable Institutions Act, 1926, for the Wellington Hospital District.

The plaintiff was a party to the following agreement with the Wellington Hospital Board, dated July 31, 1947:

AGREEMENT made this 31st day of July 1947 BETWEEN THE WELLINGTON HOSPITAL BOARD (hereinafter called "the Board") of the one part and Hubert George Rix of Wellington, Medical Practitioner (hereinafter called "the practitioner") of the other part WHEREAS the Board has resolved to appoint the practitioner as a member of the part-time staff at the HUTT HOSPITAL as anaesthetist NOW IT IS HEREBY AGREED as follows:—

1. THE Board will employ the practitioner as one of the part-time medical staff at the Hutt Hospital and the practitioner will faithfully and to the best of his skill serve the Board for a period of two years from the 1st day of August 1947 subject however to prior determination as hereinafter appears.

2. THE Board will pay the practitioner during the continuance of his employment a salary at the rate of £200 per annum payable by equal monthly payments on the last day of each month.

3. THE service of the practitioner shall be at the disposal of the Board at all times, but except in cases of urgency or necessity the normal services to be rendered by the practitioner shall be two sessions of three hours each per week or the equivalent thereof the intention being that the practitioner shall devote at least six hours of his time spread over seven days in each week to the service of the Board.

4. THE practitioner shall be entitled to four weeks' holiday for each year of service but such leave shall be taken at such time or times as shall be determined by the Board.

5. DURING the first year of service the practitioner may be granted sick leave for seven days on full pay (whether such days be consecutive or non-consecutive). After the first year sick leave may be granted at the rate of seven days for each completed year of service on the part-time paid staff (including reappointments) up to a maximum of ten weeks. In exceptional cases further sick leave may be granted by the Board. The practitioner shall not be entitled to any such sick leave except on the certification of another medical practitioner.

6. IF the practitioner shall be absent from his duties for seven consecutive days without the consent of the Board the Board may by notice in writing to the practitioner forthwith terminate the employment of the practitioner and the employment of the practitioner may also be determined forthwith if the practitioner shall be guilty of any gross default or misconduct or breach or non-observance of any of the stipulations herein contained.

7. IF the practitioner shall be engaged on military duty interfering with his services to the Board special leave without remuneration shall be granted by the Board to such practitioner during the period of such military duty but the Board shall be entitled to engage another person to perform the duties of the practitioner during such a period.

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8. DURING the period of his employment the practitioner shall—

- (a) Observe and conform to all the laws and customs of the medical profession.
- (b) Fulfil, obey and comply with all by-laws, rules and regulations of the Board and with the lawful orders and directions of the Board and of all persons duly authorized by the Board to give the same.
- (c) Not at any time except in case of illness or other unavoidable cause absent himself from the service of the Board without the Board's previous consent.
- (d) Not to disclose (except to the Board or to any persons having lawful authority to require such disclosure) any professional secrets or any information with respect to any patient or inmate of the hospital or in respect to any direction given to him by the Board or by any person duly authorized by the Board.
- (e) Keep such records as the Board may require him to keep and so that the same shall at all times be available to the Board.

9. EITHER the Board or the practitioner may determine the employment of the practitioner hereunder at any time by giving to the other one month's notice of his desire to determine same.

The plaintiff had held the office or appointment of a member of the part-time staff of the Hospital Board at the Hutt Hospital as an anaesthetist continuously for some years up to July 31, 1947.

On and before July 31, 1947, there was in operation a scale of fees which had been fixed by the Wellington Hospital Board prescribing fees over and above the salary payable to visiting and/or part-time anaesthetists appointed by the Hospital Board, which fees would be paid by the Board to an anaesthetist called to administer an anaesthetic at a time other than during the normal or regular session fixed for such anaesthetist.

By letter dated September 4, 1946, the plaintiff had been advised by the Secretary of the Hospital Board of the arrangement and scale referred to in the preceding paragraph. Such letter was as follows :

Wellington Hospital Board
Wellington.

September 4, 1946.

Dr. H. G. Rix,
16 Waterloo Road,
LOWER HUTT.

Dear Sir,

As a result of representations made to Dr. Cairney by Dr. Slater, the Board's Senior Anaesthetist, I have now to advise you that the Board has reconsidered the scale of fees for special anaesthetics—i.e., anaesthetics administered by a visiting anaesthetist at times other than his regular sessions of attendances.

The following scale will be adopted for such special anaesthetics as from September 1, 1946 :

First hour, Three Guineas. For each subsequent half-hour, One Guinea, with maximum of Six Guineas for any length of operation.

Yours faithfully,

J. B. I. Cook,

Secretary.

On July 31, 1947, the arrangement and scale above referred to remained in full force and effect to the knowledge of both the Hospital Board and the plaintiff.

A written circular issued for the month of August, 1947, by the Superintendent-in-Chief of the Hospital Board to visiting medical staff contained, *inter alia*, an instruction to anaesthetists, a copy of which is as follows :

ANAESTHETISTS.

The ordinary hours of attendance of each visiting anaesthetist are two operating sessions each week, as set out in the Anaesthetics List for the Wellington Hospital or the Hutt Hospital, as the case may be. This list is available in theatres and wards.

In the Anaesthetics List a house surgeon is shown as being on call on the principal operating day of each general surgical team. In such cases the house surgeon on call is available, in addition to the visiting anaesthetist, in order that, if necessary, the team may have two operations in progress at the one time.

The attention of all visiting anaesthetists is especially directed to the existence of a hospital rule which states that, except in circumstances of extreme urgency, there must be no change of anaesthetists during the course of an operation.

Apart from the fixed sessions referred to above, it is permissible for additional attendance of a visiting anaesthetist to be arranged in any case (*e.g.*, in certain emergency cases) where the operating surgeon considers that the services of a visiting anaesthetist are necessary. For this purpose it is permissible for arrangements to be made for a visiting anaesthetist on the Wellington staff to attend at Hutt, and *vice versa*. When a visiting anaesthetist renders additional services in this manner at a time other than his regular hours of attendance, the Board is prepared to pay a fee at the rate of three guineas for the first hour and one guinea for each succeeding half-hour, with a maximum of six guineas for any operation. Any account for such service should be forwarded to the Secretary of the Board in the case of anaesthetics administered at the Wellington Hospital, or to the Secretary-Accountant Hutt Hospital in the case of anaesthetics administered at the Hutt Hospital.

House surgeons are advised to take every opportunity of giving anaesthetics under the supervision of visiting anaesthetists, and the co-operation of visiting anaesthetists in this respect is asked for.

Should a visiting anaesthetist find that he will be unavoidably absent (as through illness) on one of his regular days, he is asked to arrange that the house surgeon attached to the surgical team be informed as early as possible, so that a substitute may be found.

Since November 19, 1947, the plaintiff had been called on behalf of the Wellington Hospital Board, pursuant to cl. 3 of the agreement above referred to, to administer anaesthetics on occasions outside the plaintiff's normal or regular sessions, entitling the plaintiff to fees totalling £18 18s. to the date of the issue of the summons, pursuant to the arrangement and scale referred to, but in no case had the fee for any one occasion equalled or exceeded the sum of £10.

The agreement above referred to had continued in full force and effect, and was in the same form (except for details covering the particular post, the salary, and the sessions and hours of work) as were the agreements made between the Hospital Board and all medical practitioners appointed to the part-time medical staff of the Board.

The Hospital Board did not enter into agreements in writing in the cases of either full-time senior medical officers appointed to its staff or of junior house surgeons. A book of standing orders was issued by the Superintendent-in-Chief of the hospitals of the Wellington Hospital Board for the guidance of house surgeons in the service of the Board.

Shorland, for the plaintiff.

The Solicitor-General, H. E. Evans, K.C., for the defendant.

N. T. Gillespie, for the Lower Hutt City Corporation.

J. W. P. Watts, for the Wellington Hospital Board.

Cur. adv. vult.

FAIR, J. The questions raised in this originating summons are submitted to the Court by the plaintiff with the consent of the Solicitor-General on behalf of the Controller and Auditor-General, and so the

principle of members accordingly members of the offence of been used for

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objections to this form of procedure which exist where a criminal offence is concerned, referred to in *New Zealand Times Co., Ltd. v. Commissioner of Police*(1), do not, in my opinion, preclude the Court determining these questions, which involve a possible liability to a penalty. Nor do I think that it is a case in which the Court should, in the exercise of its discretion, decline to consider the questions raised. 5

The first question asked is as to whether an agreement of July 31, 1947, made between the plaintiff and the Wellington Hospital Board, whereby the plaintiff was appointed as a member of the part-time staff of the Wellington Hospital as an anaesthetist, constitutes "employment" 10 of the plaintiff by such Board within the meaning of s. 10 of the Local Elections and Polls Amendment Act, 1944. That section reads as follows :

(1) Notwithstanding anything to the contrary in this or any other Act, no person shall be incapable of being elected or appointed as or of being a member 15 of any local authority by reason of his employment by that local authority.

(2) For the purposes of this section the expression "local authority" means a local authority within the meaning of the Local Government Loans Board Act, 1926, whether by virtue of section two of that Act, or of any Order in Council thereunder, or by virtue of the provisions of any other Act. 20

(3) Section twenty-three of the Hospitals and Charitable Institutions Act, 1926, is hereby amended by omitting from paragraph (e) of subsection one the words "or who holds a paid office under any contributory local authority within the hospital district."

Consideration of the meaning of this section requires consideration 25 also of s. 23 (1) (e) of the Hospitals and Charitable Institutions Act, 1926. That section, so far as it is applicable before the amendment contained in s. 10 (3) above, read as follows :

(1) The following persons shall be incapable of being elected or appointed as members of a Hospital Board . . . 30

(e) A person who holds any office or place of profit under or in the gift of the Board, or who holds a paid office under any contributory local authority within the hospital district.

The plaintiff, at an election held on November 19, 1947, was elected as one of the representatives of the combined contributory district 35 comprising the Hutt City and the Borough of Eastbourne, to the Wellington Hospital Board, which is a board constituted under the Hospitals and Charitable Institutions Act, 1926, for the Wellington Hospital District, and a "local authority" within the meaning of that term in s. 10. At the time of his election, he was serving the Board as a part-time 40 anaesthetist under the agreement of July 31, 1947. The agreement was for a term of two years from August 1, 1947, subject to determination on either side by one month's notice. The Board contracted to pay him a salary of £200 per annum, payable by equal monthly payments on the last day of each month. It was contemplated that he should 45 attend at the hospital for two sessions of three hours each per week or the equivalent thereof, provision being made for special payments for attendances upon emergencies. Provision was made for four weeks' holiday for each year of service, and for sick leave. The provision for sick leave shows that the agreement contemplated his re-appointment, 50 as it expressly refers to re-appointments, and provides for sick leave up to a maximum of ten weeks. This agreement is still in full force and effect, and it is to determine whether its existence disqualifies the plaintiff from acting as a member of the Board that the Court is asked to decide the first question asked in the originating summons. 55

(1) (1909) 29 N.Z.L.R. 53.

Mr. *Shorland* argued that, despite the provisions of s. 23 (1) (e), the opening words of s. 10 avoided any disqualification if the office or place of profit referred to in s. 23 (1) (e) involved employment. But the fact that by s. 10 (3) the Legislature left the main part of the disqualification remaining, shows that it was intended to be effective to disqualify the class of persons described; and the problem the Court has to decide is what is the exact meaning and effect of the two provisions read together.

It appears clear that the opening words of s. 10 (1) must be read, if possible, so as to give effect to the intention that s. 23 (1) (e) as amended should also be effective, and so to construe the opening words of subs. 1. The words of *Lord Wrenbury* in *Great Western Railway Co. v. Bater*(2) apply to the provision in s. 23 (1) (e): "But there it is. The Court cannot say it means nothing and cannot be construed at all. The Court must as best it can arrive at some meaning of the language which bears upon the particular case before it for decision, although it may be, as I think it is, impossible to declare in general terms the true meaning so as to guide and control in the future a decision upon other facts"(3).

In practically every case, both an "office" and a "place of profit" involve "employment," in the wide meaning of that word, which is also its ordinary meaning, by the Hospital Board. But the wide language of the opening words of s. 10, construed in their ordinary meaning, could not have been intended to nullify the recognition by subs. 3 of s. 10 of s. 23 (1) (e). This would be the effect, it appears, for reasons I indicate later, if the word "employment" in s. 10 (1) were construed as excluding from disqualification persons in the employment of the company who held offices or places of profit.

There seems no great difficulty in interpreting s. 10 (1) so as to reconcile the two provisions and make both provisions intelligible and operative. The words "public office" have been held at times to extend only to a public employment regulated by law. In this restricted sense, it has not infrequently been interpreted in America: *2 Stroud's Judicial Dictionary*, 2nd Ed. 1323, and the American cases there cited. It has also been indicated in *Great Western Railway Co. v. Bater*(4) that it may be restricted to a substantive office. *Lord Atkinson*(5) expresses his full concurrence with *Rowlatt, J.*, in a "happily expressed" passage quoted on the same page, as follows: "It is argued, and to my mind argued most forcibly, that that shows that what those who used the language of the Act of 1842 meant when they spoke of an office or an employment of profit, was an office or employment which was a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, which went on and was filled in succession by successive holders, and that if a man was engaged to do any duties which might be assigned to him, whatever the terms on which he was engaged, his employment to do those duties did not create an office to which those duties were attached; he was merely employed to do certain things . . . I myself think that that contention is sound . . . My own view is that Parliament in using this language in 1842 meant by an office a substantive thing that existed apart from the holder of the office"(6).

The interpretation of a somewhat similar provision to that in s. 23 (1) (e) was discussed at length in that case, and *Lord Wrenbury* indicated

(2) [1922] 2 A.C. 1.

(3) *Ibid.*, 30, 31.

(4) [1922] 2 A.C. 1.

(5) *Ibid.*, 15.

(6) [1920] 3 K.B. 266, 274.

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that to constitute a particular employment an "office" some status of dignity or responsibility may require to be looked for. It is there said: "In some future case it may be necessary to inquire whether that which is contemplated is not an office permanent in its nature to which upon the occasion of a vacancy a successor must be or naturally would be appointed, whether some status of dignity or responsibility is not to be looked for, whether in some definite manner public duty or public position is not contemplated. This may well be the case"(7). The same view has apparently been taken in America: see *Black's Law Dictionary*, 1286 (citing cases the reports of which are not available here), to the effect that an "officer" is distinct from an "employee" in the greater importance, dignity, and independence of his position, in requirement of oath, bond, more enduring tenure, and the fact of duties being prescribed by law.

The office of Town Clerk to a city or borough under s. 66 of the Municipal Corporations Act, 1933, is probably such a substantive "office," and also those of Secretary or Treasurer to a Hospital Board appointed under s. 36 of the Hospitals and Charitable Institutions Act, 1926. A collector under s. 69 of the last-mentioned Act would probably not be the holder of a substantive office of the kind indicated.

Turning to the Hospitals and Charitable Institutions Act itself, it is to be found that in s. 36 a distinction is made between officers and other employees, and under s. 37 the word "officers" is also used, although in that section nurses, who are excluded in s. 36, are included in the list of officers. Section 38 seems most cogent, because it classifies among medical officers, honorary medical officers, who (it is a matter of common knowledge) work part-time only; and includes in the same section a matron, master, manager, or engineer of an institution under the Act, and the Secretary to a Board. No appointment of any of these can be made until the expiration of twenty-one days after the Minister has been notified of the intention to make such appointment, unless the Minister has previously approved a proposal to make such appointment. The section further requires:

(2) Before notifying to the Minister its intention to make any appointment as aforesaid, the Board shall forward to the Minister a list of the applicants, and the Minister shall, as soon as conveniently may be, submit to the Board for its guidance such reports and recommendations as he thinks fit, and the Board shall give due and fair consideration to such recommendations before making any appointment.

This section makes it plain that those employed in the categories designated, including part-time medical officers, are considered as in a very special position, and occupying posts at least in the nature of public offices: and matrons, masters, managers, and engineers, although in many cases "servants" in the view of the law and in the employment of the Board, have a special status and responsibility.

Having regard to these considerations, it would appear reasonable to construe the word "employment" in s. 10 (1) as not applying to offices or places of profit which fall within s. 23 (1) (e); and this construction would give full effect to s. 23 (1) (e) and a reasonable effect to s. 10. In the present case, it is unnecessary to determine whether the plaintiff holds an office or a "place of profit." Both have in common in this context, I think, the requirement of higher responsibility, and a special status: and the words "place of profit" refer to an employment similar in its incidence to an office. It is both unnecessary and undesirable to define in this proceeding the exact limits or extent of their respective meanings.

During the argument, I asked counsel whether, if that were found to be the true intention of the legislation, there was any reason that could be assigned for excluding persons in such "offices" or "places of profit" from the benefit of the provisions in s. 10 (1). They were unable at the time to indicate a reason, but, upon consideration, it does appear that there may be a sufficient reason for such a distinction that may have been in the mind of the Legislature when the provisions were enacted. This class of disqualification is, as the *Solicitor-General* submitted, imposed in order to prevent a conflict arising between the personal interests and advantages of the persons concerned, and the performance of their public duties as members of the Hospital Board. That danger has been guarded against by similar disqualifying provisions to those in s. 23 in past years in respect of practically every local body. This provides the clearest indication that it was considered essential in the interests of honest and efficient administration that the temptations to which such a conflict exposes members should be avoided. It may well be that it was thought that persons holding posts of more permanency and involving higher duties, responsibilities, and remuneration might both be subjected to more temptation and able to exercise more influence to forward their own interests than employees engaged in less responsible work. It is impossible to say that there may not be much weight in this view.

Mr. *Shorland* argued that Dr. Rix is plainly in the "employment" of the Board within the ordinary meaning of that word. There is no question, to my mind, that that is so. The words "employee" or "employment" or "service" are used in practically every clause of the agreement. Clause 8 provides:

During the period of his employment the practitioner shall—

- (a) Observe and conform to all the laws and customs of the medical profession;
- (b) Fulfil, obey and comply with all by-laws, rules and regulations of the Board and with the lawful orders and directions of the Board and of all persons duly authorized by the Board to give the same.

Under s. 2 of the Hospitals and Charitable Institutions Amendment Act, 1936, the Board is liable for any negligence of (*inter alios*) a medical practitioner acting in the course of his employment or engagement with the Board, or damage caused to any person:

in the same manner and to the same extent as if the damage had been caused by an act or omission of a servant of the Board acting in the course of his employment.

- This provision would appear, by implication, to assume that without it they would not be considered in a position of "servants" of the Board. But that section was seeking to avoid the contention that the medical officers of the Board, whether on the permanent staff or part-time, or honorary, were not persons for whose negligence the Board was responsible. I do not think it is necessary to examine the large number of cases that were cited to me indicating the different bases upon which various Hospital Boards' liabilities had been negatived, either on the ground that the medical practitioners were not their "servants," or on the ground that the Board did not hold itself out to give medical treatment, but merely to provide facilities under which the patients could receive it, or on the ground that the relationship between the Board and its medical officers was not regulated by the ordinary law of master and servant. The question in the originating summons should, I think, be determined on the broad ground I have stated above, although many passages in the cases cited support the contention that "employ-

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"ment" is often not an apt word to describe the relationship between a Hospital Board and its medical staff in certain connections. The distinction, submitted by the *Solicitor-General*, between a contract for service and one for services suggested a basis somewhat similar to that which I have indicated; but it seems to me that the dividing line should be determined on the broader ground I have referred to. 5

Whatever a medical practitioner's position in law may be, he is, both by the Act itself and according to ordinary parlance, an officer of the Board, even though giving part-time service only. His position and employment might fairly be described, even in ordinary language, if the phrase were common, as a "place of profit," while it is hardly likely that anyone would think of applying that description to the work of a gardener or a porter employed by the Board. As the *Solicitor-General* argued, the less degree of control is an additional factor giving a special character in the nature of an office to the employment of the plaintiff. 10 15

On being asked what offices or places of profit, other than those adverted to above, might be held under Hospital Boards, Mr. *Shorland* referred to solicitors, architects, and auditors. So far as solicitors and architects are concerned, even if they are appointed as such to the Board, they do not hold an office of profit unless the Board is bound to engage them, or does so: see *In re Harper's Ticket Issuing and Recording Machine, Ltd., Hamlin v. The Company*(8). But in practice, of course, an architect's remuneration is generally fixed by contract with the Board, and an auditor's likewise; and, where such an appointment has been made of a solicitor at a fixed annual payment for services to be rendered on behalf of a company, he is an officer of the company: *Re Liberator Permanent Benefit Building Society*(9). Although the degree of control exercised over them is probably less than that exercised over a medical practitioner in the position of Dr. Rix, the difference is only a matter of degree. He is, by the nature of his work, practically independent of control by the Board: and the fixing of his hours of employment and his liability to be called on in an emergency are not substantial enough differences to constitute a material distinction. 20 25 30

Then it was argued that s. 23, being a penal section involving disqualification, and a penalty for acting as a member of the Board while disqualified, should be strictly construed. That is, in a sense, true. It should not be held to apply to cases about which there is a real doubt as to whether it was intended so to apply. So, too, s. 10 must be given a liberal construction. But that does not necessarily or reasonably justify a construction that nullifies the plain intention of the Legislature to impose some disqualification on persons holding appointments under the Board. A reasonable construction must also be found for s. 23 (1) (e), and each provision given effective and practical application. Mr. *Shorland's* contentions, if valid, would result in the words "place of profit" being nugatory, and, therefore, cannot be accepted. 35 40 45

Upon a consideration of all the relevant matters, and in particular upon a consideration of the distinction recognized as existing between ordinary employees and the holders of offices and places of profit, the construction intended seems clear. Unless the language is absolutely intractable, a provision will not be held to be a nullity owing to the unskilfulness of the draftsman: *Salmon v. Duncombe*(10). 50

(8) [1912] W.N. 263.

(9) (1894) 71 L.T. 406.

(10) (1886) 11 App. Cas. 627.

I am of opinion, therefore, that the terms of employment of Dr. Rix make him probably the holder of an "office," and certainly the holder of a "place of profit" in the gift of the Board, within the meaning of s. 23 (1) (e); and that he was consequently disqualified from being elected to, and now is disqualified from acting as a member of, the Hospital Board.

The answer to the first question asked in the originating summons will, therefore, be that his contract with the Board does not constitute "employment" within the meaning to be attached to that word in s. 10 (1) of the Local Elections and Polls Amendment Act, 1944, but he should be considered as the holder of a "place of profit" under or in the control of the Board. It is unnecessary to answer the other questions raised by the originating summons.

As the matter is one of general importance, and the legislation is somewhat difficult to construe, no costs will be allowed either party.

From the whole of the foregoing judgment, the plaintiff appealed, on the ground that it was erroneous in fact and law.

In the Court of Appeal,

Shorland, for the appellant. The questions for determination are whether the appellant, by reason of a part-time engagement or employment by the Wellington Hospital Board as an anaesthetist, was disqualified from being elected to and remaining a member of that Board; and whether certain fees payable in respect of extra attendances to give special anaesthetics would, if they exceeded £25 in any one year, or £10 in any one instance, disqualify the appellant from membership of the Board. The learned Judge in the Court below (1) held that the appellant was disqualified by reason of the engagement or employment, and that it was not necessary to deal with the question of fees. [After reading the agreement between the respondent Board and the appellant:] The legislation relevant to this appeal comprises the Local Elections and Polls Amendment Act, 1944, s. 10, the Hospitals and Charitable Institutions Act, 1926, s. 23 (1) (e) (f), and the Local Authorities (Members' Contracts) Act, 1934, s. 3. Section 23 (1) (f), as amended, now appears in s. 3 of the Local Authorities (Members' Contracts) Act, 1934. Reliance is placed on s. 10 of the Local Elections and Polls Amendment Act, 1944, of which subs. 3 amends s. 23 (1) (e) of the Hospitals and Charitable Institutions Act, 1926, and which, as amended, is now to be read as covering only an office or place of profit under or in the gift of the Board.

A. The rule of construction which arises from the opening words of s. 10 (1) of the Local Elections and Polls Amendment Act, 1944 ("Notwithstanding anything to the contrary in this or any other Act"), requires that the ordinary meaning of that section, standing alone, is not to be curtailed by any section of any other Act. The words mean what they say; and the section is to be construed as if they stand alone, unimpeded by any other section or statute. If there are any inconsistent sections in other statutes (as the Legislature recognized when it used those opening words), those sections must yield to s. 10 (1): see *In re Bland Brothers and Inglewood Borough Council* (No. 2) (2),

(1) *Supra*, l. 1.

(2) [1920] V.L.R. 522, 523, 533.

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referring to *Sir Thomas Cecil's Case*(3), *Maxwell on the Interpretation of Statutes*, 9th Ed. 171, and *The King v. Northleach and Witney Roads Trustees*(4). The word "employment," where used, should be given its largest ordinary sense: *Craies on Statute Law*, 4th Ed. 159, and *Piercy v. Maclean*(5).

B. Section 10 of the Local Elections and Polls Amendment Act, 1944, applies to a large number of local bodies besides Hospital Boards; and consideration of the other relevant statutes shows that the construction appearing in the judgment appealed from(6) could not have been intended by the Legislature.

The local authorities referred to in s. 10 (2) of the Local Elections and Polls Amendment Act, 1944, are those set out in s. 2 of the Local Government Loans Board Act, 1926, and referred to in s. 2 of the Local Authorities (Members' Contracts) Act, 1934, and see s. 2 of the Local Bodies Loans Act, 1926. In relation to each of these bodies, there is the same disqualification section: Municipal Corporations Act, 1933, s. 37; Counties Act, 1920, s. 62; Road Boards Act, 1908, s. 30; River Boards Act, 1908, s. 29 (d); Electric-power Boards Act, 1925, s. 21; and Harbours Act, 1923, s. 34 (g). In practically all these statutes the disqualification clause is the same as is contained in the Hospitals and Charitable Institutions Act, 1926: an exception is found in ss. 22, 30, and 44 of the Town Boards Act, 1908. The judgment appealed from distinguishes between a local body's power to appoint officers and its power to appoint servants; but as to the power to appoint officers and servants, see Municipal Corporations Act, 1933, s. 66 (2) (officers and servants); Counties Act, 1920, s. 107 (3) (officers); Road Boards Act, 1908, s. 56 (4) (officers); River Boards Act, 1908, s. 46 (5) (officers); Electric-power Boards Act, 1925, s. 48 (officers and servants); and Harbours Act, 1923, s. 47 (officers and servants). There is no statutory requirement in respect of the local bodies referred to such as exists in s. 38 of the Hospitals and Charitable Institutions Act, 1926, to provide that the Board or Council must give notice to the Minister before making an appointment.

The learned Judge in the Court below does not define the test by which persons holding offices or places of profit are distinguishable from employees, but he attaches great importance to the requirements of s. 38 of the Hospitals and Charitable Institutions Act, 1926, relating to the appointment by Hospital Boards of medical officers, managers, matrons, and engineers. If the test be that appointment as an officer elevates an employee to an "office or place of profit," there would be no purpose in the Legislature expressly applying s. 10 of the Local Elections and Polls Amendment Act, 1944, to counties, Road Boards, River Boards, and those local bodies which appoint only officers, because, if the Legislature had in mind only officers appointed in the particular manner prescribed by s. 38 of the Hospitals and Charitable Institutions Act, 1926, s. 10 would apply only to that statute. On the other hand, if the necessity for notice to the Minister in ss. 38 and 39 is an essential requirement of "office or place of profit," and the test by which an employee is elevated to the higher status, then, as no such notification is required in the case of any other local body, there would be no necessity for the Legislature to apply the Act to any of the other local bodies;

(3) (1597) 7 Co. Rep. 18a; 77 E.R. 440.

(5) (1870) L.R. 5 C.P. 252, 261.

(4) (1834) 5 B. & Ad. 978; 110 E.R. 1052.

(6) *Ante*, p. 396, l. 45.

but, nevertheless, it has done so. It is clear that the construction adopted in the judgment could not have been intended by the Legislature.

C. The terms "office" and "place of profit" have a wider meaning than that given to them in the Court below(7), and both have a wider meaning than "employment." As to the meaning of the word "office," see 2 *Stroud's Judicial Dictionary*, 2nd Ed. 1323.

The learned Judge(8) refers to *Great Western Railway Co. v. Bater*(9), but that case is distinguishable; it deals with different words and they were in an income-tax statute; and it is of no help in construing the words "office or place of profit" in the statutes under notice. The words are very old words and were used in the Act of Settlement and in the Succession to the Crown Act, 1707 (3 *Halsbury's Complete Statutes of England*, 182), and also in the Municipal Corporations Act, 1882 (45 & 46 Vict., c. 50), s. 12 (19 *Halsbury's Complete Statutes of England*, 580): for decisions on the Succession to the Crown Act, 1707, see *Rogers on Election Petitions*, 12, 13; and as to s. 12 of the Municipal Corporations Act, 1882, see *Nell v. Longbottom*(10). As to the expression "any paid office" used in s. 46 of the Local Government Act, 1894 (56 & 57 Vict., c. 73) (10 *Halsbury's Complete Statutes of England* 773, 805), see *The King v. Davies, Ex parte Penn*(11) (roadman), *Crumph v. Lewis*(12) (Clerk to Distress Committee), and *Greville-Smith v. Tomlin*(13) (Clerk to Joint Committee). The word "office" has a very wide meaning: it means any office, and is unqualified by the alternative words "place of profit": see *Re Liberator Permanent Benefit Building Society*(14), *In re Harper's Ticket Issuing and Recording Machine, Ltd., Hamlin v. The Company*(15), and *In re London and General Bank*(16). Under s. 66 (2) of the Municipal Corporations Act, 1933, a Borough or City Council is empowered to appoint a medical officer: for similar provisions, see the Road Boards Act, 1908, s. 57, and the Town Boards Act, 1908, ss. 30, 44. The fact that the Legislature thought it necessary to declare that certain officers or holders of office could be members of the Council or Board suggests that the term "office" was intended to include, and does include, an office in respect of which no salary is paid. Under the Hospitals and Charitable Institutions Act, 1926, there are officers who would clearly not be employed by the Board, such as honorary medical officers (ss. 37, 38), and teachers and students of a medical school (s. 84). Honorary officers are not employed as servants, as they are gratuitous givers of services. There are holders both of "offices" and "places of profit," who would not be in the employment of the Board. The express repeal of the latter part of s. 23 (1) (e) of the Hospitals and Charitable Institutions Act, 1923, is consistent with the policy that salaried or wage-paid employees are not to be disqualified from election; and with leaving the disqualification in the case of holders of offices and places of profit—e.g., worker-participation in management.

The word "employment" as used in s. 10 (1) of the Local Elections and Polls Amendment Act, 1944, is to be construed in its ordinary sense, which embraces the relationship which exists between a medical practitioner engaged by a Hospital Board on a salary, whether the con-

(7) *Ante*, p. 396, l. 45.

(8) *Ante*, p. 395, l. 34.

(9) [1922] 2 A.C. 1, 8, 9, 13, 14, 19, 33.

(10) [1894] 1 Q.B. 767, 769.

(11) [1932] 48 T.L.R. 666.

(12) [1908] 1 K.B. 858.

(13) [1911] 2 K.B. 9.

(14) (1894) 71 L.T. 406.

(15) [1912] W.N. 263, 264.

(16) [1895] 2 Ch. 166.

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tract is one of service or for services. The contract in the present case is one of service, and constitutes the appellant a servant of the Hospital Board. The special fees for special attendances outside ordinary hours are payments pursuant to the "employment" in terms of the agreement(17), and fall within s. 10 (1).

As to the meaning of "employment": In s. 2 of the Hospitals and Charitable Institutions Amendment Act, 1936, the Legislature uses the word "employed" to express the relationship between a salaried doctor and a Hospital Board, and the word "engaged" when referring to honorary officers. In this sense the word "employed" has been interpreted by the Courts in relation to medical practitioners serving a Hospital Board, particularly in those cases which go to the question of the applicability of the doctrine of *respondet superior* to that relationship: *Hillyer v. St. Bartholomew's Hospital (Governors)*(18), *Evans v. Liverpool Corporation*(19), *Auckland District Hospital and Charitable Aid Board v. Lovett*(20), *Collins v. Hertfordshire County Council*(21), *Lecture League, Ltd. v. London County Council*(22), and *University of London Press, Ltd. v. University Tutorial Press, Ltd.*(23). The word "employed" in its ordinary sense covers the relationship between the appellant and the Board; but employment is not an essential ingredient in either office or place of profit. The appellant is a "servant" of the Board in the true sense of that word. A highly-skilled professional person can be engaged upon a contract of service, and the test is whether or not there is a right of control in the manner of doing his work: see *Gold v. Essex County Council* (radiographer)(24) and *Walker v. Crystal Palace Football Club, Ltd.*(25) (professional footballer).

Hospital Boards are now liable for acts of negligence on the part of the members of their medical staff, so that this Board and other Boards have taken care to exercise the right to control the doctors on their staffs to the extent that servants are controlled through their respective medical superintendents. The contract in this case does not admit of any interpretation other than that of a contract of service: see *Mersey Docks and Harbour Board v. Coggins and Griffith (Liverpool), Ltd.*(26). Those who have the benefit of s. 10 are those in the employment of the local authority; and, even if the word "employment" be restricted to the relationship of master and servant, the contract is within s. 10.

As to the payment to the appellant of special fees: Under the appellant's contract of service, his services were required at all times. Before the contract was entered into, there was a practice or custom that fees at the specified rate would be paid on all occasions when an anaesthetist was called to administer an anaesthetic outside the ordinary hours. That practice and understanding, which existed to the knowledge of both parties when the contract was signed, imply that, under the contract, overtime would be paid for by means of such special fees. The facts show that, immediately after the contract was signed, the Board issued a circular instruction to anaesthetists, constituting a variation of the original contract. The special fees are payments within

(17) *Ante*, p. 392, l. 44.

(18) [1909] 2 K.B. 820, 825.

(19) [1906] 1 K.B. 160, 166.

(20) (1892) 10 N.Z.L.R. 597, 606.

(21) [1947] 1 K.B. 598, 619; [1947] 1 All E.R. 633, 640, 641.

(22) (1913) 108 L.T. 924, 926, 927.

(23) [1916] 2 Ch. 601, 610.

(24) [1942] 2 K.B. 293, 313; [1942] 2 All E.R. 237, 250.

(25) [1910] 1 K.B. 87, 92, 93.

(26) [1947] A.C. 1, 12, 17, 21; [1946] 2 All E.R. 345, 348, 351, 355.

the employment, and, as such, covered by s. 10. In any event, the amounts received by the appellant do not disqualify him: he was in the "employment" of the Board, so that *prima facie* he is within s. 10 (1) of the Local Elections and Polls Amendment Act, 1944, which removed the disqualification of employment under s. 23 (1) (e) of the Hospitals and Charitable Institutions Act, 1926.

J. H. Oakley, for the Lower Hutt City Corporation, and *J. W. P. Watts*, for the Wellington Hospital Board, did not submit argument.

The Solicitor-General, H. E. Evans, K.C., for the respondent. The appellant is a person who holds "an office or place of profit" under or in the gift of the Board: see s. 23 (1) (e) of the Hospitals and Charitable Institutions Act, 1926. He is concerned or interested in a contract made with the Board under which the payment to be made by the Board exceeds £25 in any financial year: Local Authorities (Members' Contracts) Act, 1934, s. 3 (3). The word "employment" in s. 10 (1) of the Local Elections and Polls Amendment Act, 1944, is limited to the relationship of master and servant, and that is not the relationship between the appellant and the Board. Even if the word "employment" in that section is not limited to that particular meaning, the appellant is not in the employment of the Board.

The general scheme of the Local Authorities (Members' Contracts) Act, 1934, was to enact an all-embracing provision relating to contracts, and it relates comprehensively to contracts: it left standing in each of a whole series of statutes a provision as to the holding of an office or place of profit: it does not use the term "office or place of profit"; and, in the particular case of Hospital Boards, it left standing the words "A person who holds any office or place of profit under or in the gift of the Board," whether fees were paid or not: Hospitals and Charitable Institutions Act, 1926, s. 23 (1); and see the Statutes Amendment Act, 1938, s. 52, relating to trustees of public reserves, which shows that the Legislature, in s. 52 of the Statutes Amendment Act, 1938, has recognized that payment for services in an office or place of profit may also be a payment in respect of a contract. Section 10 must be regarded as a subtraction from, *inter alia*, the provisions of ss. 23 and 24 of the Hospitals and Charitable Institutions Act, 1926. The word "employment" in s. 10 means employment under a contract of service. A contract for services remains either within s. 23 (1) (e) of the Hospitals and Charitable Institutions Act, 1926, or within s. 3 of the Local Authorities (Members' Contracts) Act, 1934, or within both. It is difficult to define any dividing line between what is within s. 10 and what is not, unless it is made at contract of service. In s. 6 of the Finance Act (No. 2), 1941, the expression used is "employee"; it means employment in the ordinary sense of the term, and it is so used in the Hospitals and Charitable Institutions Amendment Act, 1936, s. 2 of which provides for the liability of a Board for the acts of the specified persons as "if they were servants," not as "servants"; and it was passed to meet the position arising from the decision in *Logan v. Waitaki Hospital Board* (27).

The term "employment" has a wide range of meanings: see 3 *Oxford English Dictionary*, Pt. I, 130. As used in s. 10 (1) of the Local Elections and Polls Amendment Act, 1944, its meaning depends on its context; cf. the word "servant" as used in s. 5 of the Crown Suits Amend-

(27) [1935] N.Z.L.R. 385.

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ment Act, 1910, in relation to employer's liability. The expressions in the appellant's contract which imply service relate to those parts of the contract which do not refer to the method of performance of the medical duties; and the medical duties are the dominant part of the contract. The words that suggest service relate to such matters as the non-disclosure of confidences (cl. 8 (d)), the keeping of records (cl. 8 (e)), and the general provisions as to the times when the medical officer is to be available to give his services (cls. 3, 4, and 6), and are not directed towards the treatment of the patients. The medical practitioner is to follow a standard as set from outside, and not as prescribed by the Board (cl. 8 (a)). The contract is determinable on a month's notice if the Board is not satisfied with the appellant's performance of his duties (cl. 9). The general acceptance of the nature of the work of a doctor or surgeon is opposed to the relationship of master and servant; and expressions which imply service do not refer to the performance of medical duties, which are the dominant part of the contract. As to the duties performed in hospitals by a medical practitioner, see *Auckland District Hospital and Charitable Aid Board v. Lovett*(28), *Logan v. Waitaki Hospital Board*(29), *Hillyer v. St. Bartholomew's Hospital (Governors)*(30), cited in *Ashburton High School Board of Governors v. Urquhart*(31), and in *Logan v. Waitaki Hospital Board*(32); and see also *Smith v. Martin and Kingston-upon-Hull Corporation*(33), *James v. Probyn*(34), cited in *Strangways-Lesmere v. Clayton*(35), *Gold v. Essex County Council*(36), *Collins v. Hertfordshire County Council*(37), and *Simmons v. Heath Laundry Co.*(38).

[To O'LEARY, C.J.] The Legislature, after the decision in *Logan's* case(39), placed the liability for negligence on the Hospital Boards, but that did not affect the fact that the persons named are not servants of the Board.

[KENNEDY, J., refers to *Lindsey County Council v. Marshall*(40).]

A distinction must be drawn between the facts there set out and the conduct of a surgical operation. *Hillyer's* case(41) is distinguishable. The distinction between house surgeons and members of the visiting staff can be gathered from the Board's instructions to house surgeons.

Shorland, in reply. The appellant is engaged as an anaesthetist and can be controlled by the Superintendent, or by a skilled employee of the hospital, as to the kind of anaesthetic to be administered, and, within certain limits, as to the method to be adopted. He must keep records (cl. 8 (d) of his agreement), and cl. 8 (e) merely sets out his duties as an anaesthetist. He is a servant of the Board. No written contract with house surgeons is made by the Board.

Cur. adv. vult.

- (28) (1892) 10 N.Z.L.R. 597.
- (29) [1935] N.Z.L.R. 385.
- (30) [1909] 2 K.B. 820, 825, 829.
- (31) [1921] N.Z.L.R. 164, 181.
- (32) [1935] N.Z.L.R. 385.
- (33) [1911] 2 K.B. 775, 781, 784.
- (34) [1935] *The Times*, May 29.
- (35) [1936] 2 K.B. 11, 17; [1936] 1 All E.R. 484, 487, 488.

- (36) [1942] 2 K.B. 293, 302, 305, 310, 313; [1942] 2 All E.R. 237, 242, 243, 244, 248, 249, 250; [1942] 1 All E.R. 326, 329.
- (37) [1947] 1 K.B. 598, 617, 618; [1947] 1 All E.R. 633, 639, 640.
- (38) [1910] 1 K.B. 543, 549, 550.
- (39) [1935] N.Z.L.R. 385.
- (40) [1937] A.C. 97; [1936] 2 All E.R. 1076.
- (41) [1909] 2 K.B. 820.

O'LEARY, C.J. The appellant, a duly qualified practitioner, was on November 19, 1947, returned by a contributing District as one of its representatives on the Wellington Hospital Board.

He was at the time of his election a member of the part-time staff of the Hutt Hospital as an anaesthetist, holding this position in pursuance of an agreement dated July 31, 1947, between the Board and himself. A question being raised as to whether or not appellant was disqualified from election because of s. 3 of the Local Authorities (Members' Contracts) Act, 1934, an originating summons was issued to determine the question. *Fair, J.*, heard the summons and in a considered judgment(1) held, for the reasons he stated, that appellant was disqualified from being elected to, and from acting as a member of, the Wellington Hospital Board. The appeal is from that judgment.

Appellant's case is wholly dependent on s. 10 (1) of the Local Elections and Polls Amendment Act, 1944, which is as follows :

Notwithstanding anything to the contrary in this or any other Act, no person shall be incapable of being elected or appointed as or of being a member of any local authority by reason of his employment by that local authority.

The learned Judge held that the agreement between the appellant and the Board did not constitute employment within the meaning to be attached to that word in the enactment just quoted. He further held that he is the holder of a place of profit under or in the gift of the Board within the meaning of s. 23 (1) (e) of the Hospitals and Charitable Institutions Act, 1926, and was consequently disqualified. This subsection, in so far as is relevant, is as follows :

The following persons shall be incapable of being elected or appointed as members of a Hospital Board . . .

(e) A person who holds any office or place of profit under or in the gift of the Board.

Section 3 of the Local Authorities (Members' Contracts) Act, 1934, renders incapable of election as members of any local authority anyone concerned in any contract with the local authority payment in respect of which exceeds £10 in the case of any contract or £25 altogether in any financial year. There are qualifications and exceptions which do not require notice.

In this Court, the learned *Solicitor-General* contended as follows :

(i) That appellant is a person who holds an office or place of profit in the gift of the Board.

(ii) That he is concerned or interested in a contract under which payment to be made exceeds £25.

(iii) That employment in s. 10 of the Act of 1944 is limited to the relationship of master and servant, and that is not the relationship between appellant and the Board.

(iv) That, even if employment has a wider meaning, appellant is not in the employment of the Board.

For appellant, it was contended that he is in the employment of the Board, and, therefore, because of the application of s. 10 (1) of the Act of 1944, he is capable of being elected.

Dealing first with the interpretation of s. 10 (1), due weight must be given to the opening words "Notwithstanding anything to the contrary in this or any other Act." In other Acts—viz., the Hospitals and Charitable Institutions Act, 1926, and the Local Authorities (Members' Contracts) Act, 1934—there is "something to the contrary"

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in the sections I have already quoted, and which are relied on by the Solicitor-General, but it seems to me that those provisions are made ineffective by the opening words of s. 10 (1), provided, of course, the principal part of the section is complied with. In other words, if "employment" is proved, the provisions of the other Acts must be disregarded. 5

I think the authority cited by Mr. *Shorland*—namely, *In re Bland Brothers and Inglewood Borough Council* (No. 2)(2)—which had under consideration a statutory provision with similar opening words, is helpful. *Cussen, J.*, in delivering the judgment of himself and two other members of the Court, said: "Coming now to the contention that ss. 259 and 260 are limited to injury directly caused by authorized acts, the grounds 10 "mainly relied upon are the introductory words of s. 259 'Notwithstanding anything in this Act contained,' and the fact that Part VI "and its divisions are dealing with what is called 'compensation.' As 15 "to the introductory words, the section should first be construed without them, and then, if there is anything in the other provisions of the "Act inconsistent with the interpretation so arrived at, these other "provisions must yield. This was in effect decided, as we understand, "by all the Justices of England in *Sir Thomas Cecil's Case* ((1597) 20 "7 Co. Rep. 18b, 19, 20), where it was said that the Act otherwise was "to be no impediment to the interpretation of a section containing "the words 'notwithstanding, &c.'"(3).

To apply the words of this judgment to the present case, the provisions of the other Acts are inconsistent with the interpretation arrived at, 25 and, therefore, these provisions must yield or are no impediment.

Is, then, the appellant in the employment of the Board?

Numerous authorities were cited to support the contention that the relationship between a medical practitioner and a Hospital Board is not, and cannot be, that of master and servant. It may be that 30 these authorities, which were almost wholly concerned with cases where claims for negligence were made, would be applicable in similar cases. I do not think they are applicable in the present case, where there is an agreement for employment between the appellant and the Board. It seems to me that that agreement speaks for itself, that it is a contract 35 of employment and it renders the authorities cited inapplicable.

A perusal of the terms of the agreement shows in the recital that the Board has resolved to appoint the practitioner (the appellant) as a member of the part-time staff of the Hutt Hospital, and it is agreed that the Board will employ the practitioner as one of the part-time 40 medical staff and the practitioner will serve the Board.

Then there is provision for payment during the continuance of employment, and the service of the practitioner shall be at the disposal of the Board.

Then follows provision for holidays for each year of service, and also 45 for termination of the employment.

An important provision is cl. 8, which requires the practitioner during the period of his employment to:

fulfil obey and comply with all by-laws rules and regulations of the Board and with the lawful orders and directions of the Board and of all persons duly authorized by the Board and to keep such records as the Board may require him to keep. 50

I am of opinion that this agreement sets up a relationship of employment between the Board and the appellant—that appellant is an employee—and by reason of that he is not incapable of being elected to the Board,

(2) [1920] V.L.R. 522.

(3) *Ibid.*, 533.

the disqualifying provisions of other Acts being nullified by the opening portion of s. 10 of the Act of 1944. It seems to me that this would be the result, even if it were held that the appellant's position was an office or place of profit. Because of the view I take of the effect of the section, I do not think it necessary to pass judgment on whether the appellant holds an office or a place of profit; even if he did, s. 10 (1) saves him from disqualification.

I would allow the appeal.

KENNEDY, J. The appellant was elected one of the representatives of a combined contributory district on the Wellington Hospital Board. He was, at the time of his election, a part-time anaesthetist engaged by the Board to serve it as such, and the terms and conditions of his engagement are set out in his contract. The Judge in the Court below was of the opinion that the appellant held either an office or place of profit upon the Board, and, notwithstanding the provisions of s. 10 of the Local Elections and Polls Amendment Act, 1944, was still incapable of being elected or appointed as, or of being, a member of the Board. It was further submitted in this Court that the appellant was disqualified by the Local Authorities (Members' Contracts) Act, 1934, which applied to what was said to be his contract for services.

Before the passing of the Local Elections and Polls Amendment Act, 1944, there were two main matters of disqualification for election to local bodies—namely, an interest in a contract with the local authority in question, or the holding of an office or place of profit under it. The first disqualification appeared in a general statute which applied to a great many local bodies. The second disqualification is referred to in the many special statutes dealing with local bodies.

The general provision was that made by the Local Authorities (Members' Contracts) Act, 1934. Section 3 provided for disqualification in these terms:

No person shall be capable of being elected or appointed to be or of being a member of any local authority if he is concerned or interested . . . in any contract made by the local authority if the payment made or to be made by or on behalf of the local authority in respect of any such contract or contracts exceeds ten pounds in the case of any contract, or twenty-five pounds altogether in any financial year.

This provision would apply to most contracts of employment and disqualify, and render incapable of continuing in office as members, persons in the employment of the Board.

The Hospitals and Charitable Institutions Act, 1926, contained special provisions for other disqualifications, and the following persons were by s. 23 (1) deemed incapable of being elected or appointed as, or of being, members of a Hospital Board—namely, *inter alia*, "(e) A person who holds any office or place of profit under or in the gift of the Board": and originally there appeared the further words, "or who holds a paid office under any contributory local authority within the hospital district." Section 24 (1) was complementary, and provided as follows:

The office of any member of a Hospital Board shall become vacant if he . . . (g) Holds any office or place of profit under or in the gift of the Board.

The introductory words of s. 10 of the Local Elections and Polls Amendment Act, 1944, must be accorded operative force as a declaration of legislative intention. That section runs:

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(1) Notwithstanding anything to the contrary in this or any other Act, no person shall be incapable of being elected or appointed as or of being a member of any local authority by reason of his employment by that local authority.

Two observations as to the application of this provision may be made. In the first place, this is a general provision, not applying in particular to a Hospital Board, but applying generally to many local authorities, and I do not think, accordingly, it falls to be interpreted in the light alone of the special statutory provisions contained in the Hospitals and Charitable Institutions Act, 1926. In the second place, the provision is that the section applies notwithstanding anything to the contrary "in this or any other Act," and, accordingly, the provision made by s. 10 applies notwithstanding anything to the contrary, if there be such, in the Hospitals and Charitable Institutions Act, 1926, and in the Local Authorities (Members' Contracts) Act, 1934. Formerly, it may well have been that employment in the service of the Board would have been a disqualification. The effect of the amending provision must accordingly be that employment in the service of the Board shall not be a ground of disqualification. The result is that, notwithstanding that it might otherwise be disqualification under the Local Authorities (Members' Contracts) Act, 1934, or under the Hospitals and Charitable Institutions Act, 1926, it shall, since the passing of the amending Act, be no disqualification. The holding of an office or place of profit may still remain a disqualification provided that the office or place of profit does not consist in employment in the service of the Board. There is, so I add in deference to the view which appealed to the learned Judge, room for the operation of the words of disqualification still retained in the Hospitals and Charitable Institutions Act, 1926, in s. 23 (1) (e). But, if the office or place of profit lies in employment in the service of the Board, then there is no disqualification. Of course, if there was superimposed upon a contract of employment some other arrangement which was not employment, s. 10 would not operate to remove disqualification arising otherwise than from the employment. In that event, however, the disqualification would not be because of the employment, but in spite of the employment, and because of something which was not employment.

One comes, then, to the nature of the arrangement existing between the plaintiff and the Hospital Board. Essentially, as I see it, the submission came to this, that the appellant as a doctor rendered services which, having regard to his special position *vis-à-vis* an employer and to the skilled nature of his work, recognized and referred to in many cases, should be regarded as rendered under an arrangement with the Board which was in part a contract of service (or employment) and in part a contract for services. But, when one looks at the contract of service, one finds it is in the common and usual form, and I see no reason to treat it as other than what it appears to be—namely, an ordinary contract of employment. I think, in the circumstances, what may be described as the further or extra work is really work done in employment, but for fees specially provided for that extra work. There was, accordingly, no attraction of the disqualification clauses of the Local Authorities (Members' Contracts) Act, 1934, for s. 10 of the Local Elections and Polls Amendment Act, 1944, saves disqualification because the payments are for employment. Nor was s. 23 (1) (e) of the Hospitals and Charitable Institutions Act, 1926, attracted, for, if there was an office or a place of profit, it lay in employment in the service of the Board.

It remains specially to refer to certain reasons which appealed to the learned Judge. He was, so it appears to me, of opinion that it was reasonable to construe the word "employment" in s. 10 (1) as not applying to offices or places of profit within s. 23 (1) (e), which words con-
 5 noted a higher responsibility and status than was dignified in its context by the word "employment." I am unable, myself, to take this view. I think the emphatic opening words of s. 10 (1) indicate that the disqualifications otherwise existing by virtue of any statute do not prevail in face of the legislative declaration of capability for office which follows
 10 from its provision that :

no person shall be incapable of being elected . . . a member of any local authority by reason of his employment by that local authority.

Giving due force to that declaration, I think the word "employment" must be given its ordinary meaning, and it should not, in order to
 15 reconcile s. 10 (1) with other provisions which are not dominant but subject to it, be read as excluding service where those employed have that greater responsibility and higher status which generally characterize an office or place of profit. Earlier statutory provisions must then give way to s. 10 (1), and, indeed, any other provision of the amending
 20 Act itself must give way to the overriding provision of s. 10 (1). While s. 10 repeals only part of s. 23, and leaves standing that part of s. 23 dealing with the disqualification of an office or place of profit, it is clear that what is left is always subject to s. 10 (1), which provision is expressly declared to prevail notwithstanding anything to the contrary
 25 contained in the Local Elections and Polls Amendment Act, 1944, itself. I do not think, accordingly, that the retention of s. 23 (2) by the amending provision shows that s. 23 (2) must remain unaffected by s. 10 (1), and that its retention, on the contrary, operates to restrict or modify the meaning of the word "employment" used in s. 10 (1). I am of
 30 opinion, for these reasons, with respect for the view which attracted the learned Judge, that the word "employment" used in s. 10 (1) is not to be limited to employment other than that of such responsibility or special status that you could say the employment was in an office or place of profit.

The learned Judge also found support for his interpretation in the distinction which the Hospitals and Charitable Institutions Act, 1926, itself makes between certain officers in the service of the Board and certain persons other than officers. The amending provision under
 35 consideration is, however, not a special provision applying to Hospital Boards only, but a general provision applying to a great number of local bodies, and the special circumstances of Hospital Boards and the special provisions of the Act regulating their constitution do not, so I think, show that the word "employment" used in s. 10 (1) of the amending Act should, in the light of them, bear a restricted meaning.

The general result of these considerations is that the appellant was not incapable of being elected or appointed as a member, or of being
 40 a member, of the Board by reason of the agreement, or by reason of the payment for extra services. Accordingly, in my view, the appeal should be allowed.

CORNISH, J. Section 23 (1) (e) of the Hospitals and Charitable Institutions Act, 1926, provided that certain classes of persons should be incapable of being elected or appointed as members of a Hospital Board, among them being persons holding :

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(e) . . . any office or place of profit under or in the gift of the Board,
or . . . a paid office under any contributory local authority within the hospital
district.

This latter disqualification was repealed in 1944, as will appear
later.

Section 10 (1) of the Local Elections and Polls Amendment Act,
1944, provided that :

Notwithstanding anything to the contrary in this or any other Act no person
shall be incapable of being elected or appointed as or being a member of any local
authority by reason of his employment by that local authority.

(By virtue of subs. 2 of the same section, a Hospital Board is a "local
"authority" within the meaning of subs. 1. Therefore, a person
"holding any office or place of profit under or in the gift of a Hospital
"Board" is not to be disqualified by reason of his employment by the
Board.

Appellant is a part-time anaesthetist in the Hutt Hospital. He
holds that position by virtue of a written contract between him and the
Board. If that position is "an office or place of profit," his tenure
of it does not, in my opinion, disqualify him from membership of the
Board if it is due to, or the result of, his employment by the Board.
Is he, then, in the "employment" of the Board, so that between it and
him the relation of master and servant exists? The Solicitor-General
concedes that, if he is, he is not disqualified from membership of the
Board.

The agreement of July 31, 1947, between appellant and respondent
states that respondent will employ appellant; that appellant will
"faithfully and to the best of his skill serve" respondent; that respondent
will pay appellant "during the continuance of his employment a salary
"at the rate of £200 per annum"; that "the service of [appellant]
"shall be at the disposal of [respondent] at all times"; that "during
"the first year of service [appellant] may be granted sick leave for
"seven days on full pay"; that "during the period of his employment"
the appellant shall "fulfil, obey and comply with . . . the lawful
"orders and directions of the Board and of all persons duly authorized
"by the Board to give same"; and shall not at any time "except in
"case of illness . . . absent himself from the service of the Board
"without the Board's previous consent."

In my opinion, these terms point clearly to the relation of master and
servant between the Board and the practitioner. One man may be
the servant of another even though the work that he does is skilled in
character and requires so much exercise of discretion that the other cannot
in all respects direct how that work shall be done. That, I think, is the
position here. I can see no reason in principle why a doctor should not,
by contract, become the servant of a Hospital Board. In *Gold v.*
Essex County Council(1), *Goddard, L.J.*, said: "That they [hospital
"managers] are not liable for the doctor's negligence is due simply
"and solely to the fact that he is not their servant. I desire, however,
"to say that for the purpose of this judgment, I am not considering
"the case of doctors on the permanent staff of the hospital. Whether
"the authority would be liable for their negligence depends, in my
"opinion, on whether there is a contract of service and that must de-
"pend on the facts of any particular case"(2).

(1) [1942] 2 K.B. 293; [1942] 2 All (2) *Ibid.*, 313; 250.
E.R. 237.

In my opinion, Dr. Rix became, by contract, the servant of the Hospital Board, and he is, therefore, as I think, not disqualified from membership of the Board.

- The learned Judge in the Court below thought that the Legislature, having by subs. 3 of s. 10 of the Local Elections and Polls Amendment Act, 1944, deliberately chosen not to repeal the first (while it repealed the second) relative clause of s. 23 (1) (e) of the Hospitals and Charitable Institutions Act, 1926, thereby indicated its intention that this first clause should continue to have effect notwithstanding s. 10 (1) of the Local Elections and Polls Amendment Act, 1944. This continued effect, which, in His Honour's opinion, it had, was a narrowing of the meaning of the term "employment" so as to exclude from it employment due to the holding of an office or place of profit in the gift of the Board. In his opinion, therefore, such employment still disqualified; but employment arising otherwise did not. From this inference, if right, it followed, in my opinion, that anything which was "to the contrary" in the Act of 1926, and which was, therefore, overridden by the Act of 1944, would be a provision in the first of these Acts to the effect that employment arising otherwise than by the conferring and holding of an office or place of profit disqualified from membership of the Board. But there is no such provision in the Hospitals and Charitable Institutions Act, 1926. In this Act, the only provisions "to the contrary" of s. 10 (1) of the Local Elections and Polls Amendment Act, 1944—that is, the only provisions that can work disqualification when there is employment by a local authority—are those relating to the holding of an office or place of profit, and to the being concerned or interested in any contract of more than £10 in the case of a single contract, or £25 altogether in any financial year.

- If those disqualifications in the Act of 1926 had been specifically repealed, there would have been nothing left in that Act "to the contrary" of what was in the Act of 1944. In other words, there would have been nothing for the remedial legislation of 1944 to work on. What the legislation of 1944 was designed to override was inconsistent provisions of certain statutes—in the present case, of the Hospitals and Charitable Institutions Act, 1926. The only such provisions were those that annexed disqualification to the holding of an office or place of profit or the being interested in certain contracts. I think, therefore, that, from the fact that the first clause of s. 23 (1) (e) of the Hospitals and Charitable Institutions Act, 1926, was not in terms repealed, no inference is to be drawn that it was intended by the Legislature to prevail against s. 10 (1) of the Act of 1944. I infer, therefore, that the disability-removing effect of the 1944 Act is not to be deemed restricted to employment arising otherwise than by the holding of an office or place of profit, or the having the benefit of a contract for more than a specified amount. If, therefore, Dr. Rix holds "an office or place of profit," that circumstance does not disqualify him, who is an employee of the Board, from membership of it.

- The reason for the express repeal (in subs. 3 of s. 10 of the Local Elections and Polls Amendment Act, 1944) of the second clause of s. 23 (1) (e) of the Hospitals and Charitable Institutions Act, 1926, is correctly given, in my opinion, by *Stanton, J.*(3). This repeal was only the draftsman's mode of bringing servants of contributory local authorities within the scope of subs. 1 of s. 10 of the Local Elections and Polls Amendment Act, 1944.

(3) *Post*, p. 415, l. 9.

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As to the fees earned by Dr. Rix for special anaesthetics, these, in my opinion, were and are earned by him by virtue of his employment by the Board, and do not disqualify him from membership.

I agree that the appeal should be allowed.

STANTON, J. This is an appeal from the judgment of *Fair, J.*(1), 5 on an originating summons for a declaratory order under the Declaratory Judgments Act, 1908, that a certain agreement between the appellant and the Wellington Hospital Board constituted an employment of the appellant by the said Board within the meaning of s. 10 of the Local Elections and Polls Amendment Act, 1944, and that he, therefore, was 10 not incapable of being elected or being a member of the said Board. The learned Judge held that the said agreement did not constitute an employment, and that, accordingly, the appellant was not qualified to be a member of the said Board.

The appellant was, in November, 1947, elected as a member of the 15 Wellington Hospital Board, and has since continued to act as such. At the time of his election, he was a member of the Board's staff, his engagement being the subject of a written agreement dated July 31, 1947, which is set out in the agreed statement of facts. From this agreement, it appears that the Board agreed to "employ" the appellant 20 and the latter agreed to "serve" the Board as one of the part-time medical staff at the Hutt Hospital for a period of two years as from August 1, 1947, subject, however, to the right of either party to determine the agreement on one month's notice. The appellant undertook to give a definite number of hours' service each week, and there were usual 25 terms as to holidays, sick leave, and specification of duties, and the Board agreed to pay the appellant a salary at the rate of £200 per annum. The appellant also undertook certain occasional duties not covered by his regular salary, but it appeared to be common ground that these duties were ancillary to the main agreement, and payments in respect of 30 them were in the same position as payments under the main agreement.

It was contended by the *Solicitor-General*, who appeared for the respondent, that this agreement constituted a contract between the appellant and the Board, under which the payment to be made by the Board exceeded £25 a year, and that appellant was consequently dis- 35 qualified for membership of the Board under s. 3 of the Local Authorities (Members' Contracts) Act, 1934, and that it did not constitute a contract of employment under s. 10 of the Local Elections and Polls Amendment Act, 1944, so that his disqualification was not removed by the last-mentioned section. 40

The learned Judge in the Court below considered that the word "employment" in s. 10 did not apply to persons holding an office or place of profit, that the appellant held an office or place of profit under the Board, and that he was thereby disqualified for membership, notwithstanding the provisions of s. 10. 45

It seems to me that the question really depends on the proper construction to be placed on s. 10 of the Act of 1944, and a consequential determination as to whether the contract between the appellant and the Board is one affected by that section.

I think the question of interpretation may well be approached by 50 following the principles laid down in the ancient but apposite authority known as *Heydon's Case*(2), which was quoted and applied by a Full Court, comprising *Edwards, Chapman, and Herdman, JJ.*, in *Christie*

(1) *Ante*, p. 393.

(2) (1584) 3 Co. Rep. 7a; 76 E.R. 637.

v. *Hastie, Bull, and Pickering, Ltd.*(3). In the last-mentioned case, *Edwards, J.*, delivering the judgment of the Court, said: "We have here an enactment for the interpretation of which there are no precedents. That interpretation must therefore be determined by certain well-recognized principles for the interpretation of all statutes, and upon the application of these principles to the facts of the case. The principles to which we refer were laid down by *Lord Coke* in the year 1584 in *Heydon's Case* thus: 'And it was resolved by them [all the Barons of the Exchequer] that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: (b) 1st. What was the common law before the making of the Act? (c) 2nd. What was the mischief and defect for which the common law did not provide? 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth. And, 4th, the true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*'"(4).

Before the passing of the Local Elections and Polls Amendment Act, 1944, there were two classes of persons who were disqualified from being members of local authorities: (i) those who held an office or place of profit under or in the gift of the particular local authority, and (ii) those who were interested in contracts with the local authority beyond certain small amounts. These disqualifications were inserted in the various Acts relating to the different classes of local authorities, such as the Acts constituting Borough Councils, County Councils, Road Boards, Town Boards, Electric-power Boards, Hospital Boards and a host of others. The wording was not identical in each case, but the effect was for all purposes the same. In 1934, an attempt was made to unify the provisions relating to disqualification from entering into contracts with local authorities by the enactment of the Local Authorities (Members' Contracts) Act of that year, and the provisions in the various special statutes were repealed. No attempt was made to deal similarly with the other class of disqualification (that relating to the holding of an office or place of profit), and the provisions of the numerous special statutes relating thereto remained—with some small exceptions not here material—in force and unaffected until the passing of the Local Elections and Polls Amendment Act, 1944. It is perhaps unnecessary, but may be desirable, to observe that these provisions clearly disqualified all paid employees of a local authority, and all holders of an office, whether paid or unpaid, under or in the gift of a local authority, from becoming members of that authority. Persons who did not hold an office or place of profit, but made casual contracts for the supply of goods or services, were equally disqualified.

It may, therefore, be said that, for all practical purposes, those persons who were employed by a local authority could not become members of it.

In 1944, Parliament evidently considered that this was a defect or mischief in the body politic which should be remedied, and it declared in s. 10 of the Local Elections and Polls Amendment Act, 1944, that in future, notwithstanding the continued existence in the various special

(3) [1921] N.Z.L.R. 1.

(4) *Ibid.*, 9.

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Acts of the disqualifying provisions relating to (among others) employees of local authorities, no person should thereafter be incapable of being elected or appointed as, or of being, a member of any local authority, by reason of his employment by that local authority. It will be observed that this section does not remove all the disqualifications previously existing, but it does provide that, where this disqualification, whether under the provisions relating to an office or place of profit or under those relating to contracts, arises out of a contract of employment, it should now be removed. If it did not effect this, it effected nothing, and authority is hardly necessary to justify a Court in refusing to reduce a statute to a nullity if that can be avoided. In the present case, all that is necessary is to determine the meaning of the word "employment," and, in its context and with its background, that word here can mean only a contract for personal service wherein the relation of master and servant exists. If that be so, then such a contract is no longer subject to the disabling provisions of s. 3 of the Act of 1934 or the various provisions of the special Acts relating to an office or place of profit.

It was suggested by the *Solicitor-General* that the appellant's contract with the Hospital Board is not a contract of employment because of what has been decided in England in the line of cases of which *Hillyer v. St. Bartholomew's Hospital (Governors)*(5) is the outstanding example. These cases were primarily concerned with the liability of hospital authorities for the negligence of physicians, surgeons, and others working in those hospitals, but they are really not applicable or helpful in determining the present question. Notwithstanding the immunity which such authorities enjoyed in respect of the negligence of surgeons and physicians working in their hospitals, these experts could still be regarded as in the employment of the hospital authorities for the purpose now under consideration. In *Lindsey County Council v. Marshall*(6), *Lord Wright* said: "It is not necessary to add that in all these matters not only the matron and nurses but the medical officers were in my opinion the servants of the appellants"(7). The *Solicitor-General* admitted that house surgeons, and probably the Medical Superintendent, would be employees of the Hospital Board for the present purpose, although the Hospital Board would not be liable for their negligence if the decisions quoted were applicable in New Zealand, which they are not, owing to the provisions contained in s. 2 of the Hospitals and Charitable Institutions Amendment Act, 1936. I cannot see any essential difference between the position of the appellant under his agreement and the position of house surgeons under their conditions of employment. In each case, the practitioner becomes a servant or employee of the Board, and the fact that one is a whole-time service and the other a part-time service, or that one is subject to a greater measure of control or direction than the other, cannot make any difference.

In the judgment appealed from, reference is made to subs. 3 of s. 10, which is as follows:

Section twenty-three of the Hospitals and Charitable Institutions Act, 1926, is hereby amended by omitting from paragraph (e) of subsection one the words "or who holds a paid office under any contributory local authority within the hospital district."

(5) [1909] 2 K.B. 820.

(7) *Ibid.*, 125; 1095.

(6) [1937] A.C. 97; [1936] 2 All E.R. 1076.

The learned Judge pointed out that the remainder of para. (e) was left unrepealed and that it disqualified a person who holds any office or place of profit under or in the gift of the Board. He therefore thought that effect should still be given to that provision, and the meaning of "employment" must be modified to exclude from its ambit any person who held an office or place of profit under or in the gift of the Board. This construction involves a severe limitation of the apparent purpose of subs. 1 of s. 10, and requires the introduction of a classification of employees which obviously creates many difficulties. I think, with respect, that the reason for the somewhat peculiar method adopted is rather to be found in the fact that members of Hospital Boards were subject to a special disqualification if they held "a paid office under any contributory local authority within the hospital district." Such persons were not, and could not be, employees of the Board itself, and their disqualification was not, therefore, removed by subs. 1, and, as a simple method of dealing with this particular form of disqualification, the disabling provision was itself repealed. But, when this was done, employees of Hospital Boards were in the same position as employees of any other local authority, and, by the operation of subs. 1, became entitled to be elected, and to be, members of the Board by which they were employed.

I think the appeal should be allowed, and that an order should be made declaring that the agreement between the appellant and the Wellington Hospital Board above referred to constitutes an employment of the appellant by the Board, and that the appellant was not, at the date of his election to the Board, and has not at any time since become, incapable of election to or membership of the said Board by reason of the subsistence of the said agreement, and that the receipt by the appellant of the fees (exceeding £25 in any financial year or £10 in any one instance) prescribed by the scale of fees fixed by the Board for payment to part-time anaesthetists at times outside the fixed sessions or hours prescribed by the said agreement would not come within s. 3 of the Local Authorities (Members' Contracts) Act, 1934.

As to costs, I think the appellant should have his costs, both in the Court below and on this appeal, on the middle scale.

Appeal allowed.

Solicitors for the appellant: *Chapman, Tripp, Watson, James, and Co.* (Wellington).

Solicitors for the respondent: *Crown Law Office* (Wellington).

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[IN THE SUPREME COURT.]

HAZELDON *v.* McARA: SAME *v.* BIRCHFIELD:
SAME *v.* BARRINGTON.

SUPREME COURT (FULL COURT). Wellington. 1948. July 9, 12, 13; September 17. SIR HUMPHREY O'LEARY, C.J.; KENNEDY, J.; FAIR, J.

Municipal Corporations—Powers—Regulation of Use of Public Reserves—By-law—Meetings—By-law providing No Meeting to be held in (inter alia) any Public Reserve “except with the prior written authority of the Town Clerk.”—Valid Delegation by City Council of Authority to permit Use of Reserve to Town Clerk—Discretion left to Town Clerk not so great as to be Unreasonable—Municipal Corporations Act, 1933, s. 364 (1) (18)—By-laws Act, 1910, s. 13.

The power of “regulating the use of any reserve” given by s. 364 (18) of the Municipal Corporations Act, 1933, to the council of a city or borough implies a power of partial restriction, which may take the form of regulation by means of a prohibition which is relaxed on the permit of the regulating body, or, where authorized, by one of its officers.

Clause 62 (as amended) of Part I of the Wellington City By-laws (dealing with streets and public places) made it an offence on the part of anyone who :

“(a) Organizes, holds, or conducts or attempts to hold or conduct
“any public meeting, gathering or demonstration or makes any public address
“or attempts to collect a crowd in along or upon any street, private street,
“public place or public reserve in the City except with the prior written
“authority of the Town Clerk.”

Such by-law was *intra vires* and reasonable, as the delegation of the authority of the Council to its Town Clerk is empowered by s. 13 of the By-laws Act, 1910; and the discretion thereby left to the Town Clerk is not so great as to be unreasonable.

So held by the Full Court, allowing an appeal from the judgment of Mr. A. M. Goulding, S.M., reported (1948) 5 M.C.D. 441.

APPEAL from the judgment of Mr. A. M. Goulding, S.M., reported (1948) 5 M.C.D. 441, dismissing an information by an Inspector for the Wellington City Council against each of three defendants for conducting meetings on the Dixon Street Reserve without the prior written authority of the Town Clerk. The informations against Farrington and McARA related to the evenings of October 31 and November 7, 1947, and those against Mrs. Birchfield related to the evening of October 31, 1947, and lunch-hour on Thursday, November 6.

The facts which emerged from the evidence, so far as they related to the charges, were as follow :

Dixon Street Reserve was a public reserve vested in the Wellington City Corporation. On the various occasions alleged, the respective defendants did address public meetings at the Reserve. Such meetings were quite orderly, and from sixty to one hundred people were present on each occasion. None of the defendants had permits from the Town Clerk in respect of the meetings held on October 31 and November 7, 1947, but Mrs. Birchfield claimed that she had a permit for Thursday, November 6.

Mr. Barrington was president of a body called the Christian Pacifist Society. In February, 1947, he made application to the City Director of Parks and Reserves for permission for his society to hold open-air meetings on Friday evenings, either at (a) Dixon Street Reserve, or (b) the corner of Allen Street and Courtenay Place, or (c) Swan Lane. The

Director of Parks and Reserves replied saying the application was not approved by either the Reserves Committee or the By-laws Committee. No reason was given for the non-approval. Thereupon Mr. Barrington wrote asking why a permit for all three sites was refused, and whether the refusal was general or applied only to the three sites.

The Town Clerk replied on March 31, 1947, stating :

The By-laws Committee of the Council is of opinion that these meetings should not be held on Friday evenings as the City streets are already overcrowded with pedestrians and vehicular traffic.

- 10 Mr. Barrington later decided to hold meetings without a permit, and over a period from August to December, 1947, he repeatedly addressed public meetings at Dixon Street Reserve on Friday evenings. There was no evidence that any complaints of any kind were made to the City authorities concerning any of those meetings. The learned Magistrate accepted that fact, plus Mr. Barrington's own evidence, as showing that the meetings were in no way disorderly or a cause of annoyance or disturbance to anyone.

- The defendants Mrs. Birchfield and Mr. McAra were members of the Communist Party. They also held public meetings, as alleged in the informations, at Dixon Street Reserve. Admittedly, they had no permit for the meetings on October 31 and November 7 (Friday evening), but Mrs. Birchfield, for the meeting on Thursday, November 6 (lunch-hour), placed reliance upon a permit dated November 4, 1946, under the hand of the Director of Parks and Reserves, given to the Communist Party to the following effect :

Permission is hereby granted for you to use the Dixon Street Reserve on Thursdays between 12 noon and 2 p.m.

- The learned Magistrate said that he doubted if this was a valid permit within the by-law, but, in view of the decision he had reached on other grounds, it was unnecessary to determine the point.

- It appeared from the evidence that both Mrs. Birchfield and Mr. McAra were candidates for election to the Wellington City Council in the municipal elections in November, 1947, and their meetings in October and November at Dixon Street Reserve were in furtherance of their candidature. Permits were given to the Labour Party to make use of Dixon Street Reserve for election meetings, but the evidence was not clear whether these permits covered Friday evenings.

- Clause 62 (as amended) of Part 1 of the Wellington City By-laws (dealing with streets and public places) made it an offence on the part of anyone who :

(a) Organizes, holds, or conducts or attempts to hold or conduct any public meetings, gathering or demonstration or makes any public address or attempts to collect a crowd in along or upon any street, private street, public place or public reserve in the City except with the prior written authority of the Town Clerk.

- 45 For the reasons set out in his judgment, the learned Magistrate held that the by-law was invalid, and dismissed the informations.

On appeal,

Sim, K.C., for the appellant. The findings of the learned Magistrate were wrong in law, and no ground exists for declaring the by-law invalid. The by-law was properly made, and a conviction should have been entered. An important factor in determining the validity or invalidity of a by-law is the degree of interference and the nature of the right dis-

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turbed: see *McCarthy v. Madden*(1), cited in *Doyle v. Whitehead*(2). The law recognizes no right of public meeting in a public place, and a right of passage on a highway confers no right to hold meetings there: *Halsbury's Laws of England*, 2nd Ed. Vol. 16, p. 362, para. 364 (m); p. 239, para. 288; p. 685, para. 1015; *Halsbury's Laws of England*, 2nd Ed., Vol. 31, p. 685, para. 1013. In the by-law under notice, the Council defines the terms of a privilege—the permission to hold a meeting. The same considerations apply to public reserves as well as to roads: *R. v. Cunninghame Graham and Burns*(3), *De Morgan v. Metropolitan Board of Works*(4), *Ex parte Lewis*(5), *Llandudno Urban District Council v. Woods*(6), and *Burden v. Rigler*(7). The title to the Dixon Street Reserve shows that it was dedicated as a market reserve; and it is a “public reserve” governed by ss. 16 and 18 of the Public Reserves, Domains, and National Parks Act, 1928. The by-law does not interfere with any right of the defendants, because, when permission is asked, a privilege is sought. The streets which border the Reserve are public places. The use of the highway is for the primary purposes of traffic: *Grater v. Montagu*(8).

The by-law was made under s. 364 (1) (18) (19) of the Municipal Corporations Act, 1933. The procedure for the making of the by-law under s. 369 was properly carried out. The by-law is a valid one: it must be assumed that the Council acted reasonably and gave due consideration to the matter: *Stanley v. Scott*(9), which is indistinguishable and is in line with *Aldred v. Miller*(10). There is evidence that the By-laws Committee had directed their attention to the holding of meetings on Friday evenings, and had decided that they should not be permitted. Any aggrieved person has his democratic right of appeal to the Council, and the respondents could have requested consideration of the matter by the Council.

The exigencies of the occasion called for delegated authority, 30 which, in many cases, is in the best interests of the applicant: see *Aldred v. Miller*(11); but the words “the right of public “meeting”(12) were there used by the Court *per incuriam*.

The by-law is not invalid because of the discretionary power that it confers, or because, in a particular case, it leaves a matter to be determined or prohibited from time to time by an officer of the local authority. The principal features in s. 13 of the By-laws Act, 1910, are that a by-law is not invalid because it requires anything to be done in a matter to be directed or approved “in any particular case” by an officer or servant of the local authority or any other person. The inquiry is, therefore, 40 (a) whether this is a “particular case” within the meaning of the section, and (b) whether the discretion is so great as to be unreasonable. Section 367 (b) of the Municipal Corporations Act, 1933, is a similar provision, limited to a municipal corporation. *Staples and Co., Ltd. v. Mayor, &c., of Wellington*(13) was followed by the enactment of a section similar 45 to the present s. 367 (b), and was held in *Munt, Cottrell, and Co., Ltd. v. Doyle*(14) to be no longer binding. The section is in wide terms, not restricted to detail, and it gives a wide discretion. In some respects,

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| (1) (1914) 33 N.Z.L.R. 1251, 1266, | (8) (1904) 23 N.Z.L.R. 904, 906. |
| 1267, 1269. | (9) [1935] 1 N.Z.L.G.R. 33. |
| (2) [1917] N.Z.L.R. 308, 315, 319. | (10) [1925] S.C. (J.) 21, 27, 29. |
| (3) (1888) 16 Cox C.C. 420, 429. | (11) [1925] S.C. (J.) 21, 27, 29. |
| (4) (1880) 5 Q.B.D. 155, 157. | (12) <i>Ibid.</i> , 29. |
| (5) (1888) 21 Q.B.D. 191, 196. | (13) (1900) 18 N.Z.L.R. 857, 863. |
| (6) [1899] 2 Ch. 705. | (14) (1904) 24 N.Z.L.R. 417, 425. |
| (7) [1911] 1 K.B. 337. | |

- s. 13 is more widely empowering. It permits a wider delegation than does s. 367 (b), but in one respect it is narrower, in that it has not the words "either generally or in any class of case": it uses the expression "from time to time in any case," and it applies to all local authorities, whereas
- 5 s. 367 applies only to municipal authorities. Section 13 was intended as an aid to local bodies, and is to be interpreted in that light: *Bremner v. Ruddenklau*(15) where *Munt, Cottrell, and Co., Ltd. v. Doyle*(16) was considered, and must be deemed to have been approved(17). The by-law is strictly within the very wide authority given by s. 13, which
- 10 followed the more limited assistance given to municipal authorities under s. 367 (b); and it should not be limited to a construction or application of its language that would deprive local authorities of the assistance given to them by the Legislature for the conduct of practical affairs.

- In s. 13 of the By-laws Act, 1910, the Legislature defined the terms
- 15 of a privilege, without depriving citizens of any right that they may have. In citing *Staples and Co., Ltd. v. Mayor, &c., of Wellington*(18), the learned Magistrate has ignored the fact that its authority went with the enactment of s. 367 (b); and his reasoning on *Stanley's* case(19) does not give weight to the whole of the terms of the by-law and to the fact
- 20 that with such terms it was upheld. He misapplied *Bremner v. Ruddenklau*(20).

- The terms of the by-law are not so wide as to be unreasonable. The Court is slow to hold a by-law bad for unreasonableness. As to a Court's approach to the question of unreasonableness, see *Aldred v. Miller*(21),
- 25 *Kruse v. Johnson*(22), *Staples and Co., Ltd. v. Mayor, &c., of Wellington*(23), *McCarthy v. Madden*(24), *Bremner v. Ruddenklau*(25), *Tyndall v. Basten*(26), *Kruse v. Johnson*(27), *Doyle v. Whitehead*(28), and *Slattery v. Naylor*(29). The general emphasis is upon the width of the discretion and the trust that is to be placed in the representative body: *Grater v. Montagu*
- 30 (30). The reasons why the by-law is not unreasonable and does not give too wide a discretion are: (a) The by-law is to be treated in its entirety. Wellington has many parks and reserves, and has a large population; it also has narrow streets, and the general circumstances are such that public questions can lead to noisy and possibly troublesome
- 35 meetings, interfering with the citizens' rights of passage and enjoyment of reserves. (b) Control and regulation of public meetings are, therefore, essential. (c) The Wellington City Council, from its accumulated experience, understands the City's problems, and is to be assumed to know the reasonable necessities of control. (d) Total prohibition with a dispensing power is a valid form of regulation. (e) The Council, having
- 40 power to control public meetings, has three courses open to it: (i) By the by-law itself giving a total enumeration of what is permitted and what prohibited—e.g., in a special order defining places and times where meetings could be held. It is in the interest of those who wish to hold meetings
- 45 to have the matter less rigid. Times and passing events may call for special consideration. (ii) By delegation to the Council itself. That is possible under s. 367 (b) of the Municipal Corporations Act, 1933, or

(15) [1919] N.Z.L.R. 444, 445, 469, 470, 471.

(16) [1904] 24 N.Z.L.R. 417.

(17) [1919] N.Z.L.R. 444, 455.

(18) [1900] 18 N.Z.L.R. 857, 863.

(19) [1935] 1 N.Z.L.G.R. 33, 34.

(20) [1919] N.Z.L.R. 444, 453, 454, 460, 461, 469, 470, 471.

(21) [1924] S.C. (J.) 117.

(22) [1898] 2 Q.B. 91.

(23) [1900] 18 N.Z.L.R. 857, 863.

(24) [1914] 33 N.Z.L.R. 1251, 1274.

(25) [1919] N.Z.L.R. 444, 471, 472.

(26) [1919] N.Z.L.R. 123.

(27) [1898] 2 Q.B. 91.

(28) [1917] N.Z.L.R. 308, 319, 320.

(29) [1888] 13 App. Cas. 446, 452.

(30) [1904] 23 N.Z.L.R. 904.

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s. 13 of the By-laws Act, 1910 ; but this course would be inconvenient both to the applicant and to the Council. (iii) By delegation to a responsible official, such as, in this case, to the Town Clerk. In a practical way, the same result follows whether the delegation be to the Council itself, the By-laws Committee, or the Town Clerk. The Town Clerk is the administrative officer, chosen for his wide experience and capacity to undertake responsibility : his sense of fairness is to be assumed ; and there is no likelihood of abuse to be attributed to him. It is a fair assumption that the general policy of the Council will be settled for him, and the evidence in this case shows that it was. The fact that meetings have been held without disturbance on particular occasions takes the matter no further, as such meetings have been held in circumstances where others have obeyed the law.

It will be contended that this by-law was not a regulation of the use of the Reserve, but was a prohibition. The by-law is not assailable on that ground, as due weight must be given to the fact that the by-law is not the deprivation of a right but the definition of a privilege, and, as such, the form adopted is inoffensive. It is equally inoffensive as the regulation of any right, because the control of the exercise of a right almost invariably involves prohibition in part. The regulation in the present case clearly contemplates occasions of non-user : see *Slattery v. Naylor*(31). A power to regulate frequently implies a right to prohibit : *Munt, Cottrell, and Co., Ltd. v. Doyle*(32) and *Toronto (City) Municipal Corporation v. Virgo*(33). The by-law was a prohibition in *Stanley's* case(34) and in *Aldred v. Miller*(35). In so far as *Toronto (City) Municipal Corporation v. Virgo*(35) is an authority against prohibition, it is limited by its own special circumstances. A power to regulate a trade seems to imply the continued existence of that which is to be regulated, but that does not apply to the regulation of public meetings, as here ; and see the reference in *Attorney-General for Ontario v. Attorney-General for Dominion of Canada*(37).

J. R. Marshall, in support. In the judgment appealed from, there is a confusion of the right of freedom of speech with the holding of public meetings. This case is not concerned with freedom of speech. There is no right to hold meetings in streets, or, generally speaking, in reserves. The learned Magistrate has clearly proceeded on the assumption that such a right to hold meetings exists. The Court will act on the assumption that the by-laws will be reasonably administered and that the powers given will not be abused : *Kruse v. Johnson*(38). The Town Clerk is the chief administrative officer of the City, and is subject to the checks and controls imposed on him by the Council.

N. R. Taylor, for the respondents *McAra* and *Birchfield*. The by-law is invalid because it is *ultra vires* the powers of the Council, in that it legislates beyond the power given to the Council by the enabling statute and delegates to an officer of the Corporation a power which the enabling statute grants only to the Corporation. While it is conceded that the Council has a power of delegation, it is only a limited power, and the limitation has in this case been exceeded.

The by-law-making power in this instance is to regulate only, and not totally to prohibit, a not unlawful activity. Apart from statutory

(31) (1888) 13 App. Cas. 446, 449, 450.

(32) (1904) 24 N.Z.L.R. 417, 429.

(33) [1896] A.C. 88.

(34) (1935) 1 N.Z.L.G.R. 33.

(35) [1925] S.C. (J.) 21.

(36) [1896] A.C. 88.

(37) [1896] A.C. 348, 363.

(38) [1898] 2 Q.B. 91, 98, 99, 101.

authority, a body having statutory by-law-making power cannot dispense with its own by-law, or delegate to another person or body power to dispense with it: *Abbott v. Lewis*(39) and *Staples and Co., Ltd. v. Mayor, &c., of Wellington*(40). This by-law totally prohibits the holding

- 5 of public meetings, and then says that in all cases the Town Clerk has a power of dispensation in respect of particular persons: *Parker v. Mayor, &c., of Bournemouth*(41), which is approved in *Munt, Cottrell, and Co., Ltd. v. Doyle*(42), *Collins v. Wolters*(43), and *Melbourne Corporation v. Barry*(44).
- 10 A by-law must be made in the form and manner prescribed by the enabling statute; and, apart from s. 13 of the By-laws Act, 1910, or s. 367 (b) of the Municipal Corporations Act, 1933, a by-law cannot normally delegate or give a dispensing power. If there is a power to prohibit the holding of a meeting, that power must be exercised by a
- 15 by-law. Here, the purported power to dispense is absolute: permits to do what has been declared unlawful may be issued entirely at the discretion of the Town Clerk.

- The powers of the Corporation to delegate are to be found either in s. 367 (b) of the Municipal Corporations Act, 1933, or in s. 13 of the By-laws Act, 1910. Section 367 cannot aid the appellant, because it confers the power of delegation on the Council only, and not on an officer; and even then the power must be exercised by resolution. Section 13 was
- 20 passed for two purposes: to give somewhat similar powers to counties and to enlarge the power of delegation of all local authorities by permitting them to delegate to officers in "particular cases."

[O'LEARY, C.J. Is not the reference to a "particular case" a reference to an individual instance?]

- The by-law must refer to the individual instance: it should specify the case in which the dispensation may be exercised. The power given
- 30 to dispense with the by-law here is not given subject to its exercise in any particular case, but is given so as to extend to all cases: *Bremner v. Ruddenklau*(45). The by-law must specify the conditions upon which the discretion is to be exercised: *Dewar v. Braybrook (Shire)*(46). This is a general delegation of power, and not a delegation in a particular
- 35 case.

- Even if the Court holds that the by-law is not *ultra vires* the Council, the by-law is bad because it is unreasonable. Even if the by-law is held to be *intra vires* and reasonable, it is uncertain and unequal in its operation between parties. Section 13 (2) of the By-laws Act, 1910,
- 40 specifically exempts unreasonable by-laws from the protection of s. 13: *Kruse v. Johnson*(47); and, as to its application in New Zealand, see *Graier v. Montagu*(48) and *McCarthy v. Madden*(49). The attitude which the Court would take with respect to unreasonableness under s. 13 (2) is explained in *Bremner v. Ruddenklau*(50), *Munro v. Watson*(51), *Melbourne Corporation v. Barry*(52), *Hanna v. Auckland City Corporation*(53), and *Parker v. Mayor, &c., of Bournemouth*(54). It is in evidence that permits for meetings were never issued by the Town Clerk, but
- 45 by the Traffic Inspector with regard to streets, and by the Director of

(39) (1902) 22 N.Z.L.R. 552, 559.

(40) (1900) 18 N.Z.L.R. 857, 864.

(41) (1902) 86 L.T. 449, 450.

(42) (1904) 24 N.Z.L.R. 417, 425.

(43) (1904) 24 N.Z.L.R. 499, 500.

(44) (1922) 31 C.L.R. 174, 208.

(45) [1919] N.Z.L.R. 444, 454, 458, 469.

(46) [1926] V.L.R. 201, 205.

(47) [1898] 2 Q.B. 91, 98.

(48) (1904) 23 N.Z.L.R. 904, 906.

(49) (1914) 33 N.Z.L.R. 1251, 1267.

(50) [1919] N.Z.L.R. 444, 460, 471.

(51) (1887) 57 L.T. 366, 367.

(52) (1922) 31 C.L.R. 174, 197.

(53) (1945) 5 N.Z.L.G.R. 302, 311, 1. 49, 313.

(54) (1902) 86 L.T. 449, 450.

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Parks and Reserves with regard to reserves. It is a fair inference that the Council recognized the unsuitability of the Town Clerk by referring the applications to other officers with specialized knowledge.

[KENNEDY, J. It cannot be suggested that the Town Clerk is not capable or competent to perform his duties.]

In *Stanley v. Scott*(55), the power to dispense with permits reposed in the Town Council: here it is in the Town Clerk: there is no presumption that he will act reasonably. If that case were rightly decided, it is distinguishable. Apart from delegation, the by-law is on its face unreasonable when considered in the light of *McCarthy v. Madden*(56). It prohibits a gathering of any kind without a permit: it penalizes a man who, without a permit, arranges a meeting of himself and half a dozen of his friends for the purposes of a discussion among themselves in a park: and the prohibition it imposes falls within tests (d) and (g) in *McCarthy v. Madden*(57).

This by-law is *ultra vires* because it is not regulative but is a prohibition; it is *ultra vires* because the power granted to the Council is to regulate reserves, and not totally to prohibit activities otherwise lawful: *Toronto (City) Municipal Corporation v. Virgo*(58), *Attorney-General for Ontario v. Attorney-General for Dominion of Canada*(59), and *Williams v. Weston-super-Mare Urban District Council*(60). If the Council has a valid power to regulate, it is not a valid exercise of that power either totally to prohibit a not unlawful activity in a limited area, or over a specified time, or totally to prohibit one of the possible activities as to which the Council has a power of regulation. It is conceded that a power to regulate confers some power of prohibition of some aspects of otherwise lawful activity: *Slattery v. Naylor*(61); but that power permits the Council to indicate rules as to matter, time, place, &c., which must be clearly set forth in the by-law: *Melbourne Corporation v. Barry*(62).

If the Court holds that the by-law is not unreasonable, then it is invalid because it is uncertain in its terms and indefinite in its operation as between parties: see the dissenting judgment in *Kruse v. Johnson*(63), which has since been widely adopted, as in *Page v. Harvey*(64). A person is entitled to know the terms upon which he can obtain a permit, and to that extent the by-law is uncertain in a material respect: *Melbourne Corporation v. Barry*(65). It may be said that s. 364 (18) gives the Council regulatory power over all reserves, and that such power must be deemed to include a power to prohibit in part all or one or more uses of the Reserve, but the Council cannot arrogate to itself powers to prohibit otherwise lawful activity without stating its intention in express and explicit words in the by-law, and without explicit words in the empowering statute conferring such power: *Melbourne Corporation v. Barry*(66). There is a presumption in favour of continued lawful activity: *Page v. Harvey*(67). If it is held that total partial prohibition is implied in a power to regulate, then there is nothing to prevent the Council passing a series of by-laws which would exclude eventually all users of a park or reserve.

As to *Slattery v. Naylor*(68), cited for the appellant, see the consideration given to it in *Swan Hill Corporation v. Bradbury*(69),

(55) (1935) 1 N.Z.L.G.R. 33.

(56) (1914) 33 N.Z.L.R. 1251, 1267.

(57) (1914) 33 N.Z.L.R. 1251, 1269.

(58) [1896] A.C. 88, 93.

(59) [1896] A.C. 348, 363.

(60) (1907) 98 L.T. 537, 540.

(61) (1888) 13 App. Cas. 446, 450.

(62) (1922) 31 C.L.R. 174, 197.

(63) [1898] 2 Q.B. 91, 98, 108.

(64) (1939) 3 N.Z.L.G.R. 21, 27, 29.

(65) (1922) 31 C.L.R. 174, 197.

(66) *Ibid.*, 206.

(67) (1939) 3 N.Z.L.G.R. 21, 22-27.

(68) (1888) 13 App. Cas. 446.

(69) (1937) 56 C.L.R. 746, 768, 769, 771.

- adopted in *The King v. Ferntree Gully (Shire), Ex parte Hamley*(70). If the delegation is total, it enables the Town Clerk, in effect, to repeal the by-law, and this can be effected only by the method provided by the authorizing statute: *Country Roads Board v. Neale Ads Pty., Ltd.*(71), where there was a specific power of prohibition. Under a power to regulate, regulation is properly performed by setting out in detail the matters regulated. There is no evidence to show that the Council considered these applications; even if it did, it would be irrelevant, because the Council has not taken power to do so. In *Stanley v. Scott*(72), the learned Judge was wrong in holding that the power to regulate in s. 364 (18) included a total power of prohibition. Even if this Court holds that the power to regulate is sufficient to authorize total prohibition, then that case cannot be sustained by the aid of s. 13 of the By-laws Act, 1910, because the delegation is not "in any particular case." In *De Morgan v. Metropolitan Board of Works*(73), the delegation was to the Board itself, and not to an officer. *Aldred v. Miller*(74), on the question of prohibition, is in direct contradistinction to *Toronto (City) Municipal Corporation v. Virgo*(75). The more recent decisions of the High Court of Australia have examined in much closer detail the questions of the meaning of regulation and of the meaning of prevention of nuisance—e.g., *Melbourne Corporation v. Barry*(76). The good rule and government clause—s. 364 (1)—is only ancillary to the specific powers given later: see *Barry's case*(77); and a municipal corporation cannot delegate its powers except under statutory authority: *Staples and Co., Ltd. v. Mayor, &c., of Wellington*(78). There can be no suggestion that the meetings were in themselves unlawful, or in fact a nuisance: *Stanley v. Scott*(79), *R. v. Cunningham Graham and Burns*(80), and *Burden v. Rigler*(81).

K. T. Matthews, in support.

- Barrington, in person. It is in evidence that there was no obstruction of traffic and that the meeting was conducted in a quiet and orderly manner. It has been wrongly assumed from the Town Clerk's letter that no permits were issued for meetings on Friday evenings. Permits were in fact issued, and the Court should have been informed as to their number. It is a material factor in the case. The question of delegation does not go to the root of the matter. The right of citizens freely to assemble and discuss important questions is an ancient right, and is fundamental in a democracy. The Council has a duty to assist citizens in that respect. The powers taken under the by-law are unreasonable, in that there is no definition of the matters prohibited by it.

- 40 *Sim, K.C.*, in reply. All local body legislation is delegated legislation, and, within permissible limits, delegation is lawful. The only question here is whether the permissible limits of subdelegation have been exceeded in this by-law. In every case cited to the Court, other than the public-meeting cases, there has been some interference with a right.
- 45 There is no right of holding meetings in public places: see *Dicey's Law of the Constitution*, 8th Ed. 498. *Aldred v. Miller*(82) is an isolated case. A person applying for a permit is seeking a privilege to conduct a legalized

(70) [1946] V.L.R. 501.
 (71) (1930) 43 C.L.R. 126.
 (72) (1935) 1 N.Z.L.G.R. 33.
 (73) (1880) 5 Q.B.D. 155.
 (74) [1924] S.C. (J.) 117.
 (75) [1896] A.C. 88.
 (76) (1922) 31 C.L.R. 174, 194.

(77) (1922) 31 C.L.R. 174, 193.
 (78) (1900) 18 N.Z.L.R. 857, 862.
 (79) (1935) 1 N.Z.L.G.R. 33.
 (80) (1888) 16 Cox C.C. 420.
 (81) [1911] 1 K.B. 337.
 (82) [1925] S.C. (J.) 21, 27.

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nuisance. All overseas authorities have to be considered in the light of the wording of s. 13 of the By-laws Act, 1910, of which there is no equivalent; and it was intended to confer upon local authorities the widest powers to aid the acts which are described, but with the safeguard of subs. 2 against abuse and nuisance; *Stanley's case*(83) and *Bremner's case*(84) give rise to the inference that the power has been wisely used. Section 13, in its plain language, now covers the present case. It is comparable with s. 313 of the Municipal Corporations Act, 1933, and indicates what the Legislature intended by the words "in any particular case, matter or thing" and considered appropriate in the case of delegation to a person. 5 10

There is no justification for saying that the by-law should itself specify the grounds upon which the Town Clerk should act. To grant or refuse an application is a determination in a particular case. A particular case arises when one of the matters or things enumerated arises for consideration. The whole content of a by-law may be delegated: *Dewar v. Braybrook (Shire)*(85) and *Bremner's case*(86). Section 13 authorizes the delegation of the whole content of the by-law to a specified person, and that has been effectively done in the present case. The principles of *Munt, Cottrell, and Co., Ltd.'s case*(87) and *Bremner's case*(88) should not be qualified by restrictions, as a great many by-laws have since been drawn on the assumption that they correctly stated the law. The by-law is valid in that it does not exceed the power to regulate, or any other power, given by subss. 1, 2, 3, and 4 of s. 13 of the By-laws Act, 1910, as well as by s. 364 (18) of the Municipal Corporations Act, 1933. The control of streets and the prevention of nuisances clearly come within the rule as to good order and government, a subsidiary rule which has always been given unlimited interpretation. The right to regulate involves prohibition and the restraining of the prohibited acts, and a power to prohibit is well established: *City of Montreal v. Morgan*(89), adopted with approval in *The King v. Nychuk*(90), and *Cook v. Buckle*(91). Reliance is placed on those cases and on *Slattery v. Naylor*(92) and *Aldred v. Miller*(93). 15 20 25 30

Whether or not the by-law was unreasonable because there was too wide a delegation is a question of fact, and there are no substantial grounds here for upsetting the by-law on that ground: *McCarthy v. Madden*(94) and *Stanley v. Scott*(95); and a benevolent construction must, if possible, be given in supporting it: see *Tyndall v. Basten*(96) and *Page v. Harvey*(97). For recent applications of *Kruse v. Johnson*(98), see *Sparks v. Edward Ash, Ltd.*(99) and *Harman v. Butt*(100). 35 40

There is no substantial ground for holding the by-law to be uncertain in operation, as it is exact, and capable of being understood by any law-abiding citizen. A competent and capable official must be presumed as administering it properly and objectively. 45

Cur. adv. vult. 45

O'LEARY, C.J. Each respondent was charged in the Magistrates' Court at Wellington that on the days specified in the respective informa-

(83) (1935) 1 N.Z.L.G.R. 33.

(84) [1919] N.Z.L.R. 444.

(85) [1926] V.L.R. 201, 204.

(86) [1919] N.Z.L.R. 444, 462, 463.

(87) (1904) 24 N.Z.L.R. 417, 429.

(88) [1919] N.Z.L.R. 444.

(89) (1920) 54 D.L.R. 165, 170, 171, 172.

(90) [1939] 3 D.L.R. 456, 460, 462.

(91) (1917) 23 C.L.R. 311, 318, 319.

(92) (1888) 13 App. Cas. 446.

(93) [1925] S.C. (J.) 21, 27.

(94) (1914) 33 N.Z.L.R. 1251.

(95) (1935) 1 N.Z.L.G.R. 33.

(96) [1919] N.Z.L.R. 123.

(97) (1939) 3 N.Z.L.G.R. 21.

(98) [1898] 2 Q.B. 91.

(99) [1943] K.B. 223, 228, 229; [1943] 1 All E.R. 1, 5, 6.

(100) [1944] K.B. 491, 500; [1944] 1 All E.R. 558, 564, 565.

tions he or she did make a public address in a public place, to wit the Dixon Street Reserve, without the prior written authority of the Town Clerk, contrary to certain provisions of the Wellington City By-laws.

- 5 The learned Magistrate dismissed the informations holding that the by-law was invalid(1), and the question argued before this Court was whether such determination was correct in law.

The case is an important one. On the one hand, it relates to the cherished right of free speech—the right of all citizens to express their views freely and without embarrassing restrictions. On the other, it concerns an equally important right—namely, the right of a municipality—in this case, a city—to control its city, and, whilst having due regard to such privileges as that of free speech, to ensure that the welfare and security and safety of all citizens are safeguarded.

- 15 A local body or authority has such power to carry out its functions as is given to it by the paramount statute-making authority, and in the end the matter of whether or not an offence has been committed in breach of a by-law is largely governed by the meaning of the language in which the Legislature has expressed itself. It is therefore necessary to examine the statutory authority under which the by-law was made, and, of course, the language of the by-law itself. Whilst, for myself, I am unwilling, where it can be avoided, to interfere with the exercise by a local authority of the powers entrusted to it, yet I realize that, unless one is satisfied that the power to make the particular by-law is given by statute, a conviction for breach cannot be sustained.

In this Court, respondents' main contentions were that the by-law (a) exceeded the powers given by statute—it was outside the ambit of the by-law-making power; (b) is invalid as involving a delegation; and (c) is unreasonable.

- 30 Counsel for the respective parties cited and discussed many decisions of the Courts of New Zealand, Great Britain, and Australia. Some of their decisions are helpful in solving the problems presented to the Court, and I will later refer to them. I think, however, that the most satisfactory approach that can be made to a solution is by considering the by-law itself and the relevant statutory provisions. Then, having arrived at a tentative conclusion, the decisions may be turned to, to see whether the conclusion arrived at is or is not justified.

Under the by-law, anyone commits an offence who,

- 40 Organizes, holds or conducts or attempts to hold or conduct any public meeting, gathering or demonstration or makes any public address or attempts to collect a crowd in along or upon any street, private street, public place or public reserve in the City except with the prior written authority of the Town Clerk.

- The Dixon Street Reserve is a public reserve, vested in the Wellington City Council, and the by-law prohibits the making of a public address in such reserve without the prior written authority of the Town Clerk. In other words, the use of the Reserve for a public address without the authority of the Town Clerk is prohibited. Facts bringing the respondents within the terms of the by-law were either proved or admitted.

- Before discussing the power to make the by-law, a reference to other by-laws concerning reserves will indicate some of the restrictions placed on their use by the City authorities.

Part XII of the Wellington City Consolidated By-law No. 1, 1939, has reference to reserves. In the interpretation clause, "Reserve" is expressed to include :

(1) (1948) 5 M.C.D. 441.

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any open space, plantation, park, garden, or ground set apart for public recreation which is now or hereafter may be under the management or control of the Council.

By-law No. 7 (1) provides that animals are not admitted to reserves except dogs led by a chain, &c., or except by permission in writing of the Town Clerk or a custodian. By-law No. 8 prohibits riding and driving without similar permission. By-law No. 20 prohibits Sunday games. By-law No. 26 prohibits in certain events the playing of games generally.

Various other by-laws have similar restrictions, but what I have set out shows that the Council has prohibited, not the total use of reserves, but the use for certain purpose and in certain events.

The by-law under which the respondents were prosecuted was an amendment to the main by-law made in 1940.

The statutory provision under which the by-law was made is s. 364 of the Municipal Corporations Act, 1933, the relevant portions of which are as follow :

The Council may from time to time make such by-laws as it thinks fit for all or any of the following purposes :

- (1) The good rule and government of the borough
- (18) Regulating the use of any reserve, cemetery, recreation-ground or other land, and any public building or public place vested in the Corporation or under the control of the Council.

The crucial words are " regulating the use," and the question at once arises whether power is given to place a restricted or partial prohibition on the use of reserves such as is done when public addresses are prohibited. I think that the power to regulate implies a power of partial prohibition ; otherwise, the power to regulate would be of little effect. It must include the power to prevent use by certain people at certain times, for it is not to be overlooked that reserves are set apart for (*inter alia*) recreation purposes, and this important purpose might not be attained if there could be no restriction on use. As examples, there must be power to prevent animals wandering on or being driven over a reserve, there must be power to prevent activities such as dog-racing or any other kind of racing : if there were not, then the use of the reserve by the public generally would be greatly interfered with. So, too, I think, the Council should have power to prevent public meetings and addresses which might interfere with the general use of reserves.

I therefore arrive at this—that the statutory power to regulate empowers the imposition of restrictions. It would not empower the total prohibition of the use of the reserve, but it does empower prohibition in certain circumstances and in respect of particular happenings.

Next, one has to consider that the power of dispensation is reposed in the Town Clerk. Apparently the by-law-making authority realizes that prohibition at all times for certain persons or certain activities might well be too drastic.

At the same time, it no doubt concluded that no amount of foresight would enable it to formulate in advance the time and circumstances which might prove sufficient to enable the prohibition to be lifted. An infinite variety of circumstances could arise, and it would be practically impossible to indicate with anything like certainty or precision when and when not the dispensation might be given. It therefore delegated to the Town Clerk the power to authorize a suspension of the prohibition. This seems to me to be an eminently reasonable and suitable and fair way of dealing with the matter.

If there is to be any suspension at all, as a matter of convenience an easy reference, with the likelihood of a quick decision, is very desirable.

The Court was informed that the Council met twice monthly. If authority to dispense was retained by, and reposed in, the Council itself, the delay occasioned in obtaining that authority might result in no meeting being held at all. The purpose might be an urgent one an immediate meeting desired; but, by the time the Council could meet and determine the matter, the desirability of holding the meeting may have passed. Ensuring a prompt decision is best attained by reposing in the Town Clerk the necessary authority. The Town Clerk is the chief executive and administrative officer of the Council, experienced and responsible, and, it seems to me, the most suitable person to be chosen.

What I have said deals with the matter chiefly from the point of view of expediency. It still has to be considered whether there is power so to delegate to the Town Clerk. Without such power, the delegation would not be authorized and the by-law subsequently invalid.

Section 13 of the By-laws Act, 1910, is relied on as authority for this delegation. That section is as follows:

(1) No by-law shall be invalid because it requires anything to be done within a time or in a manner to be directed or approved in any particular case by the local authority . . . or by any other person, or because the by-law leaves any matter or thing to be determined, applied, dispensed with, ordered, or prohibited from time to time in any particular case by the local authority making the by-law, or by any officer or servant of the local authority, or by any other person.

(2) This section shall not apply to any case in which the discretion so left by the by-law to the local authority, or to any officer, servant, or other person, is so great as to be unreasonable.

Analysing the relevant portion of this section, it is found that no by-law shall be invalid because the by-law (i) leaves any matter or thing (ii) to be determined, applied, dispensed with, ordered or prohibited (iii) by any officer of the local authority.

Does this section empower the delegating of the authority to the Town Clerk? On its face, I think it does.

The matter or thing is the prohibition of a public address, and this prohibition may be dispensed with in particular cases such as the respondents'. Or the matter or thing is the giving of permission, and this may be determined in the particular cases by the Town Clerk.

I can scarcely conceive of a more appropriate set of circumstances for the application of s. 13 than such as exist where there is a prohibition against use for public meetings but a power of dispensation in suitable cases.

To me, the by-law in question comes within s. 13 of the By-laws Act, 1910.

It still has to be considered whether the discretion left to the Town Clerk is so great as to be unreasonable. It must be remembered that the Council has imposed a prohibition. Is it unreasonable to leave it to the Town Clerk to say when that prohibition may be dispensed with? I can see nothing unreasonable in providing that the condition under which the prohibition ceases to operate is the consent or authority of the Town Clerk. I have already referred in some detail, which I need not repeat, to the advantages in reposing the dispensing power in this particular officer, and the reasonableness of the provision.

Unless I am obliged by authorities to find otherwise, I reach the conclusion that the by-law is within the statutory power given, that the delegation it reposes in the Town Clerk is authorized, and that such delegation is not so great as to be unreasonable.

I now proceed to consider relevant decisions on these matters and the principles embodied in them.

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Dealing first with the submission that the by-law was beyond the power given by the statute, the contention was that the power given was a power to regulate; the by-law did not regulate, but prohibited, and was, therefore, invalid.

It is well established that, if the power is merely a power to regulate, then that implies the continued existence of that which is to be regulated: *Toronto (City) Municipal Corporation v. Virgo*(2). The principle of this decision has been applied in many cases, as, for example, *Melbourne Corporation v. Barry*(3). There the statute empowered by-laws to regulate processions, but a by-law which prohibited the holding of processions altogether was held to be invalid. The by-law offended against the principle that the existence of that which was to be regulated—namely, “processions”—should be continued.

The result of this and similar decisions is that under a power to make by-laws regulating a particular subject-matter a Municipal Council has no power to prescribe that the subject-matter should not be allowed to come into existence unless the Council or an officer from time to time grants its approval in each particular case: *Swan Hill Corporation v. Bradbury*(4).

On the other hand, it is equally well established that, in a power to regulate, a power of limited prohibition is implied.

In *Kerridge v. Girling-Butcher*(5), *Smith, J.*, said: “No doubt, a certain power of prohibition is implied in the power to regulate and control. That depends upon what is to be regulated. ‘The regulation of subject-matter,’ said *Isaacs, J.*, in *President, &c., of the Shire of Tungamah v. Merret* ((1912) 15 C.L.R. 423) ‘involves the continued existence of that subject-matter, but is not inconsistent with an entire prohibition of some of its occasional incidents’”(6).

There is also no objection to the validity of a regulation that it involves a partial prohibition: *Slattery v. Naylor*(7).

Respondent's contention was that the present case came within the first class of case; appellant contended it came within the second.

I am of the opinion that appellant's contention is correct. The Council has power to regulate the use of reserves. The by-law does not prohibit the use of the Reserve generally. If it did, it would be obnoxious. It prohibits, in the present case, a particular form of use—use for public addresses—which may well lead on occasions to the disturbance, if not the annoyance, of the public generally in the use of the reserves. Lest this partial prohibition press too severely on members of the public, it empowers the Town Clerk to exempt from the prohibition in particular cases. I am therefore of opinion that respondents' contention, based on the term “regulate,” cannot be sustained.

I next consider decisions which may have a bearing on my view of the legality of the delegation to the Town Clerk.

It was contended that s. 13 of the Act of 1910 did not sanction the delegation made in this case. It was stated that there could be no effective delegation of the whole content of the by-law, and that there was not here “a particular case.”

New Zealand decisions which are in point are *Munt, Cottrell, and Co., Ltd. v. Doyle*(8) and *Bremner v. Ruddenklau*(9), and, in my opinion, 50 these authorities determine the question in favour of the appellant and should be followed by this Court.

(2) [1896] A.C. 88, 93.

(3) (1922) 31 C.L.R. 174.

(4) (1937) 56 C.L.R. 746, 752.

(5) [1933] N.Z.L.R. 646.

(6) *Ibid.*, 690, 691.

(7) (1888) 13 App. Cas. 446.

(8) (1904) 24 N.Z.L.R. 417.

(9) [1919] N.Z.L.R. 444.

Munt, Cottrell, and Co., Ltd. v. Doyle(10) was heard in 1904, when the relevant statutory provision relied on was subs. 2 of s. 405 of the Municipal Corporations Act, 1900, which provided that a by-law may leave any matter or thing to be determined, applied, dispensed with, prohibited, or regulated by the Council from time to time by resolution either generally or for any classes of cases or in any particular case. The Council of the City of Wellington made a by-law providing that traction-engines should travel only in such streets within the city and between such hours and times as the Council should from time to time by resolution prescribe. It was held (*inter alia*) that the subsection before quoted was not restricted to matters of detail or of administration, but authorized the leaving of essential matters to be dealt with by resolution.

The judgment of the Full Court, consisting of Sir Robert Stout, C.J., and Cooper and Chapman, JJ., was delivered by Cooper, J. After pointing out that, but for the enactment of 1900, the by-laws would have been bad for leaving essential matter to be prescribed by a resolution of the Council (*Staples and Co., Ltd. v. Mayor, &c., of Wellington*(11)), His Honour stated that s. 405 (2) gave very wide powers. He then said :
 "In the present case the resolution was passed at the same time as the by-law, and it cannot be suggested that the Wellington City Council has in any sense abused the powers which it possesses under s. 405. It is contended, however, on behalf of the appellants that the provisions of subs. 2 must be restricted to matters of detail and do not extend to matter of substance. The language used is, however, too express to enable us to give it this restricted meaning. The powers which may under a by-law be left to be exercised by the Council by resolution are powers (a) of application, (b) of dispensation, (c) of prohibition, and (d) of regulation, and clearly cover much more than mere matters of detail or of administration. Whether in an extreme case amounting to an abuse the Court would limit by interpretation the scope of these words is not a question which need now be considered. It might hereafter have to be considered as bearing upon the question of the reasonableness of a by-law, either in connection with its enforcement or in a proceeding under s. 412. The by-law in question in this case leaves to the Council the determination by resolution of the streets upon which a traction-engine may be permitted to travel, and the fixing of the hours and times during which such engine may travel upon such streets. It therefore leaves to the Council to determine by resolution the application of the by-law to certain specified streets upon which permission to travel is given, the prohibition from travelling upon all those other streets not specifically mentioned in such permission, and the regulation of the times and hours within which such engine may travel upon the permitted streets. All these matters are within the authority conferred by subs. 2 of s. 405, and such authority has been properly exercised in the present case. The by-law, therefore, is not bad for uncertainty in that it leaves these essential matters to be dealt with by resolution"(12).

In 1910, the By-laws Act was passed, and in *Bremner v. Ruddenklau*(13) s. 13 of that Act was fully considered. The facts of that case (taken from the head-note) were as follow :

A County Council's by-law provided that the Council might from time to time determine that owing to weather conditions any road within the county would

(10) (1904) 24 N.Z.L.R. 417.
 (11) (1900) 18 N.Z.L.R. 857.

(12) (1904) 24 N.Z.L.R. 417, 425, 426.
 (13) [1919] N.Z.L.R. 444.

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in any year be unfit for heavy traffic for any time within the months named in that behalf by s. 139 (2) of the Public Works Act, 1908. In exercise of this authority the Council passed a resolution determining that owing to weather conditions certain roads in the county were unfit for heavy traffic during a part of the period mentioned in the then current year, and that such traffic should cease thereon for the time specified. The order was made to affect all the roads in the county then so constructed as to be suitable for heavy traffic, and pursuant to the by-law it purported to come into operation on the affixing of notice of the order on some conspicuous place on each of the roads affected

In *Meredith v. Whitehead*(14), *Sim, J.*, had held that a similar delegation was invalid and was not saved by s. 13. In *Bremner v. Ruddenklau*(15), the Full Court (*Sir Robert Stout, C.J., Edwards, Chapman, and Hosking, JJ., Sim, J.*, dissenting) held that the by-law was not invalid, as the power that it delegated to the Council was limited to a particular case within the meaning of s. 13 (1), and *Meredith v. Whitehead*(16) was not followed. The Court also held that the by-law was not unreasonable. *Sir Robert Stout, C.J.*, after analysing the section and discussing whether the by-law had reference to a particular case—holding that it did, as weather conditions and unfitness of the roads for heavy traffic constituted a particular case—said: "If however the section is to be interpreted as s. 405 of the Act of 1900 has been interpreted, then in my opinion, *Munt, Cottrell, and Co., Ltd. v. Doyle* (24 N.Z.L.R. 417) is a decision which determines this case. It was there held that a by-law which delegated to the Council the power of prescribing by resolution as to how traction-engines should travel was valid. The by-law reads: 'Traction-engines shall travel only in such streets within the city, and between such hours and times, as the Council shall from time to time prescribe.' This by-law was far more drastic and gave greater power to the City Council than the by-law under consideration in the present case, and the power to make it was: 'A by-law may leave any matter or thing to be determined, applied, dispensed with, prohibited, or regulated by the Council from time to time by resolution, either generally or for any classes of cases or in any particular case.' This appeal must therefore be upheld unless *Munt, Cottrell and Co.'s* case (24 N.Z.L.R. 417) is to be over-ruled"(17). *Hosking, J.*, said: "Now the by-law in question has determined the kind of heavy traffic which is to cease, but has left the period during which and the roads on which the traffic shall cease to be determined and ordered by the Council, while at the same time it has prohibited the traffic for the period and on the roads which the Council does determine and order. The matters and things thus left to the Council are the determination of the period for which and the roads as to which the prohibition contained in the by-law is to apply. The question then is whether these matters and things have been left to be dealt with 'in any particular case.' Now, in view of the context of the enactment, I consider that a 'particular case' means something to arrive in the future; it is something which is left to be determined, applied, &c. The implication is that the particular case will be defined by the by-law. Moreover, the expression is capable of covering—and, I think, does cover—more than an individual instance the nature of which may not be definable until it actually occurs or arises. The expression is therefore, in my opinion, adequate to embrace a type of individual instances that may be likely to occur. As the delegation may apply to a particular case in which any matter or thing may be from time to time determined, applied, dispensed with,

(14) [1918] N.Z.L.R. 1041.

(15) [1919] N.Z.L.R. 444.

(16) [1918] N.Z.L.R. 1041.

(17) [1919] N.Z.L.R. 444, 455.

"ordered, or prohibited, I think a particular case covers not merely a type of individual instances, but also specific occasions or events on which the delegated authority may be exercised. It also, in my opinion, embraces a specific subject-matter upon which the delegated authority may operate. This is evident if, for example, the delegation leaves a matter or thing to be applied by the delegate, for that obviously means that the by-law may be extended to some matter or thing for which it has not itself directly provided" (18).

The by-law under consideration in the present case has not the difficulties concerning "a particular case" which were apparent in *Bremner's* case (19). Here, the by-law dictates the law to be obeyed—"no one shall make a public address" &c.—and then there is the power reposed in the Town Clerk to mitigate this prohibition in particular cases. In *Bremner's* case, the whole content of the by-law was delegated to the Council, and this was held to be valid. Following that case, it must be held that the delegation of the power of exemption to the Town Clerk is likewise valid unless the delegation is so great as to be unreasonable. I have already dealt with this aspect in the earlier part of this judgment. I can see nothing unreasonable in this delegation; on the contrary, I think it a wise one, and one which should insure that the exercise of the power of exemption will be performed impartially and expeditiously.

My consideration of the authorities confirms the opinion I expressed earlier on the examination of the by-law and the relevant statutory provisions, and I therefore conclude that the learned Magistrate erred in holding that the delegation was not authorized by s. 13 (1) of the By-laws Act, 1910, and in holding that such delegation was unreasonable. I hold that the by-law is *intra vires* and reasonable.

I would, therefore, allow the appeal.

30 KENNEDY, J. I have had the benefit of reading the judgments prepared by the Chief Justice (1) and *Fair, J.* (2), and I am content to express my own views in few words.

The delegation which the by-law contemplates is, so I think, within s. 13 of the By-laws Act, 1910: see *Munt, Cottrell, and Co., Ltd. v. Doyle* (3) and *Bremner v. Ruddenklau* (4). There was not a total prohibition of the use of the Reserve, but only a limited or restricted prohibition and the by-law regulated the use of the Reserve. It did not prohibit all assemblies, but only assemblies of a particular kind in particular places. The delegation was to a high official of the Corporation. I think, having regard to the terms of the by-law, to the limited field of activity affected, and to its being merely a dispensing power which, if exercised, removed the restriction and restored freedom, the delegation was not unreasonable. In my view, the appeals should be allowed and the matter should be remitted to the Justice with the opinion of the Court thereupon.

45 FAIR, J. This is an appeal from a decision by Mr. A. M. Goulding, S.M., in which he dismissed informations against the respondent for breaches of a Wellington City by-law making it an offence to conduct a public meeting on a City Reserve without a written permit having been obtained from the Town Clerk, and raises questions of general importance.

50 The respondent Barrington, being president of a body called the Christian Pacifist Society, in February, 1947, applied to the Wellington

(18) [1919] N.Z.L.R. 444, 469, 470.

(19) [1919] N.Z.L.R. 444.

(1) *Ante*, p. 424.

(2) *Infra*, l. 45.

(3) (1904) 24 N.Z.L.R. 417.

(4) [1919] N.Z.L.R. 444.

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City Director of Parks and Reserves for permission for his society to hold open-air meetings on Friday evenings at—

(a) Dixon Street Reserve, which is a small reserve of an area of about half an acre, triangular in shape, bounded on two sides by Dixon Street and Manners Street—two of the principal traffic streets in the City of Wellington—and on the third side by buildings, included on which is a ladies' rest room. It has a number of seats along its borders facing the pavements, and a small number of shrubs near its edges ; or

(b) the corner of Allen Street and Courtenay Place, the latter of which is a busy street in a shopping area. The former street is busy during business hours from Monday until Friday at 5 p.m., but at night and at the weekends largely deserted ; or

(c) Swan Lane, a cul-de-sac little used by the general public, but being just off the very busy shopping area of Upper Cuba Street.

A permit for any of the three sites was refused ; and, upon the respondent inquiring whether the refusal was general or applied only to these three sites, the Town Clerk replied on March 31, 1947, stating :

The By-laws Committee of the Council is of opinion that these meetings should not be held on Friday evenings as the City streets are already overcrowded with pedestrians and vehicular traffic.

The respondent thereafter decided to hold meetings without a permit, and over a period from August to December last he repeatedly addressed public meetings at the Dixon Street Reserve on Friday evenings. The Magistrate finds that the meetings were in no way disorderly or a cause of annoyance or disturbance to anyone.

Presumably upon the instructions of the Wellington City Council or its officers, the appellant, an Inspector employed by that body, laid informations against the respondent charging him with committing a breach of the City by-laws by conducting meetings on the Dixon Street Reserve on the Friday evenings of October 31 and November 7, 1947, without the prior written authority of the Town Clerk. It was proved on such proceedings that the respondent did not have a permit from the Town Clerk in respect of such meetings.

Part 1 of the Wellington City By-laws, 1933 (dealing with streets and public places), Cl. 62, Amendment No. 22, 1940, makes it an offence by anyone who :

(a) Organizes, holds, or conducts or attempts to hold or conduct any public meeting, gathering or demonstration or makes any public address or attempts to collect a crowd in along or upon any street, private street, public place or public reserve in the City except with the prior written authority of the Town Clerk.

Upon the hearing of the informations before the Magistrate (1) on February 5, 19, 1948, the facts as set out above were admitted or proved, and it was contended on behalf of the respondent, and two persons—Mr. McAra and Mrs. Birchfield—charged with similar offences, that the informations against them should be dismissed on various grounds.

The first ground was that the Council had shown unfair discrimination against them in refusing permits to speak on Friday evenings in the places referred to, as permission had been given to other people at other times to use the Reserve for that purpose on Friday evenings. The Magistrate found that the evidence before him did not establish any unfair discrimination, and that ground was not urged or supported upon this appeal.

The further ground submitted on behalf of the respondent, and the others, was that the by-law referred to was invalid because it was uncertain

and indefinite in its terms, unreasonable and unequal in its operation, and *ultra vires*.

- The learned Magistrate, after a careful consideration of the authorities dealing with such questions, found : “ (a) That a delegation of the power
5 “ to grant permits for public meetings, &c. on all streets, public places,
“ and reserves to the Town Clerk is so wide and general that it ceases
“ to be a delegation of something to be done ‘ in any particular case ’
“ within s. 13 of the By-laws Act, 1910, and becomes a complete delegation
“ to the Town Clerk of all power. (b) That for the same reasons it is
10 “ unreasonable within subs. 2 of s. 13 ” (2). That being the case, he
thought the by-law was invalid and dismissed the informations.

Section 13 of the By-laws Act, 1910, so far as it is relevant, is as follows :

- (1) No by-law shall be invalid because it requires anything to be
15 approved in any particular case by the local authority making the by-law, or by any
officer or servant of the local authority, or by any other person, or because the by-
law leaves any matter or thing to be determined in any particular case
by the local authority or by any other person.

- At the hearing of this appeal, a large number of authorities were
20 cited in support of the contention that the by-law was *ultra vires* as dele-
gating a power which the law required should be exercised by the City
Council itself. So far as they refer to decisions in New Zealand before
the passing of the By-laws Act, 1910, they are not directly applicable,
if that provision authorizes a by-law delegating powers in this form.
25 So far as authorities in other countries are concerned, they have to be
read subject to that Act. It may be said as to all such decisions that
the ground upon which they generally proceeded was that a local body
entrusted with powers to decide certain questions, or with law-making
authority to be expressed in the form of by-laws, cannot delegate the
30 authority so conferred on it to someone else. So far as the law-making
authority is concerned, that would appear to be a principle that is still,
in the absence of specific authority to delegate, of full force and effect,
and necessarily so. The making of provisions that are intended to lay
down general rules that may affect the general public in very important
35 aspects of the conduct of its business and daily affairs is a matter that,
in general, should be exercised only by those to whom it is entrusted.
The law has decided that it would be contrary to the intention of the
Legislature that such powers should be exercised by means of delegation
to an individual or subordinate body. This view was expounded and
40 enforced in this Court in *Staples and Co., Ltd. v. Mayor, &c., of Wellington*
(3) on another aspect of the same question. That case decided that a
by-law must be general in its terms, and may not leave the law to be
declared by *ad hoc* decisions by a Council itself, as each particular case
comes before it. That case was determined on August 13, 1900. The
45 law on this point was amended by the Legislature by s. 405 of the Municipal
Corporations Act, 1900, which was passed on October 18, 1900, and came
into operation on January 1, 1901, which contained a section which was
re-enacted in succeeding Municipal Corporations Acts, 1908 and 1920,
as s. 346 and s. 357 respectively, and now appears as s. 367 of the Muni-
50 cipal Corporations Act, 1933.

The power of delegation was also dealt with by the same section,
which now appears as para. (b) of s. 367, and provides as follows :

- A by-law may leave any matter or thing to be determined by, applied, dispensed
with, prohibited, or regulated by the Council from time to time by resolution, either
55 generally or for any classes of cases, or in any particular case.

(2) (1948) 5 M.C.D. 441, 446.

(3) (1900) 18 N.Z.L.R. 857.

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The law was further extended by s. 13 of the By-laws Act, 1910, which reads as follows :

(1) No by-law shall be invalid because it requires anything to be done within a time or in a manner to be directed or approved in any particular case by the local authority making the by-law, or by any officer or servant of the local authority, or by any other person, or because the by-law leaves any matter or thing to be determined, applied, dispensed with, ordered, or prohibited from time to time in any particular case by the local authority making the by-law, or by any officer or servant of the local authority, or by any other person. 5

(2) This section shall not apply to any case in which the discretion so left by the by-law to the local authority, or to any officer, servant, or other person, is so great as to be unreasonable. 10

During the past fifty years, at least, the powers and duties of local bodies have been continuously extended. Since their origin as bodies to deal with more or less restricted matters comprised in the order and good government of the area, their functions and activities have been greatly enlarged. From activities such as the supply of water, drainage, and the maintenance of public streets and facilities for recreation, their powers have been extended to a much wider range. The most striking extensions, of course, are in the way of public utility business concerns, such as transport by trams and buses, the conduct of gas and electricity undertakings, the supply of milk, and of electrical and gas equipment, and other trading activities of similar types. The time and attention required to be given by local bodies to their very varied activities have greatly increased. It was probably this consideration that led the Legislature to the enactment of the By-laws Act, 1910, which gave them much more extended powers of delegation. Somewhat similar powers have been contained from time to time in special Acts dealing with special subjects ; but this general provision is a recognition of the necessity for a general extension of their powers of delegation. It apparently does not find its counterpart in any Australian legislation, and so the Australian cases that have been cited were considered in the absence of a similar provision. 15 20 25 30

Section 13 of that Act has been construed by this Court in *Bremner v. Ruddenklau*(4), and the Magistrate considered, and the Court has been referred to, the various passages dealing with the exact meaning and effect of that provision. Having regard to its purpose, and having regard to the circumstances under which local bodies now have to carry on the administration of their duties in the very varied aspects that I have referred to, this provision must be construed in the same manner in which it has been held that the by-laws themselves should be construed—that is, benevolently: *Chapman and Hosking, JJ.*, in *Bremner v. Ruddenklau*(5). 35 40

That decision further holds that the words “ in any particular case ” in s. 13 of the By-laws Act, 1910, mean in any particular cases which may be defined by the by-law. With respect, that seems to be a most reasonable construction. Words used in the singular are, by the Acts Interpretation Act—unless the context shows otherwise—to be read as including the plural ; and so this provision is to be read as referring to any particular cases, and in that form, according to its ordinary meaning, it has the same meaning as “ for any classes of cases or in any particular case ” as used in s. 367 (b) of the Municipal Corporations Act, 1933. In the present case, the class of cases covered by the by-law are those cases where the street, reserve, or public place is desired to be used for the purpose of a public address or public gathering. Reserves have a 45 50 55

(4) [1919] N.Z.L.R. 444.

(5) *Ibid.*, 461, 470.

great many other uses, and they are not dealt with by the by-law. They are used for organized sports, by children playing, by adults for training for sports, and by older persons for rest and strolling in the fresh air. They are also used by persons to expound their views on subjects in which they have a special interest. This is a particular purpose for which it is sought to use such reserves: and, *prima facie*, such use seems a particular case. No permit is required under this by-law for use by the public in the ordinary way for exercise, fresh air, rest, or recreation.

By Part XII of the By-law (Cl. 8) the riding or driving of any animal, motor-car, bicycle, or tricycle in any reserve without the permission in writing of the Town Clerk is prohibited. Other otherwise lawful activities are prohibited on reserves by other clauses. Public processions through the streets or on public reserves by Part I, Cl. 61, require a permit in writing from the Mayor. These seem instances of particular cases within the meaning given that term by *Sir Robert Stout, C.J.*, in *Bremner's case*(6). The uses referred to in Cl. 62 are also a series of particular cases that are entrusted to the Town Clerk, and so may be regarded as "a particular case" in respect of the use of the reserves and other public places, and so within the power of delegation conferred by s. 13 of the By-laws Act, 1910. *Stanley v. Scott*(7), though not directly applicable, strongly supports the appellant's argument as to the right to delegate such powers.

It was further urged before us that the regulation was not authorized by the provisions in s. 364 (18) of the Municipal Corporations Act, 1933, which authorized the making of by-laws for the purpose of:

regulating the use of any reserve, cemetery, recreation ground or other land, and any public building or public place vested in the Corporation or under the control of the Council.

It was argued that the word "regulating" does not authorize the prohibition of the use of a reserve without a permit being obtained. It seems clear that an authority to regulate does not authorize complete and permanent prohibition of the whole of the activities or uses that are the subject of regulation. That is the effect of the decision in *Toronto (City) Municipal Corporation v. Virgo*(8). The extent and operation of that decision has been concisely stated by *Isaacs and Rich, JJ.*, in *Metropolitan Meat Industry Board v. Finlayson*(9), and I need only cite from their judgment the following passages: "As was said in the passage quoted from *Toronto Corporation v. Virgo* ([1896] A.C. 88, 93), 'regulating a matter implies its continued existence. But it also implies an altered existence. That the contention of the respondents on this point has been pressed far beyond what the Privy Council thought the real limits of the matter is clear from what their Lordships said during the argument in the Liquor Prohibition Case (*Attorney-General for Ontario v. Attorney-General for Dominion of Canada*) ([1896] A.C. 348, 363). That appears in *Mr. Lefroy's* original work, *Legislative Power in Canada*, at p. 558, note 2: 'Lord Herschell observed: "One may be said to regulate trade by prohibiting or putting a fetter on a particular trade. If you prohibit all trades, you certainly do not regulate trade; but you may be said to regulate trade by saying certain trades shall be unlawful": Printed report of the argument at p. 190. And the Lord Chancellor (*Lord Halsbury*) also said: "Trade generally may be regulated by prohibiting a particular trade. Take the case of the prohibition of the exportation

(6) [1919] N.Z.L.R. 444, 453.

(7) (1935) 1 N.Z.L.G.R. 33.

(8) [1896] A.C. 88.

(9) (1916) 22 C.L.R. 340.

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" " of wool with which this country was familiar at one time. That
 " " was a regulation of trade, and it was a prohibition of a particular
 " " trade." Whereupon Lord Watson observed: "We regulate the
 " " trade of these islands in tobacco by prohibiting its production, except
 " " to a very limited extent": *ibid.*, at p. 226. See, also, *ibid.*, at 5
 " p. 179 "(10).

Isaacs, J., in *Melbourne Corporation v. Barry*(11) concisely summarized
 the decision of the Privy Council in *Slattery v. Naylor*(12) on the same
 point. He there says: "In *Slattery v. Naylor* ((1888) 13 App. Cas. 446)
 " the question arose as to the power of the Borough of Petersham in 10
 " New South Wales to make a by-law prohibiting burials in any then
 " existing cemetery within 100 yards of any public building, place of
 " worship, school-room, dwellinghouse, public pathway, street, road or
 " place whatsoever within the Borough. This had the effect of entirely
 " and absolutely closing up a certain cemetery. That was absolute 15
 " prohibition, no doubt, as to that cemetery; and the Privy Council
 " had to consider whether that accorded with the power to 'regulate'
 " given by the Act. Their Lordships held that it did, but for a very
 " distinct reason. The power given was to regulate 'the interment
 " of the dead' generally throughout the whole Borough. No doubt, 20
 " the council could not 'prohibit' the interment of the dead throughout
 " the whole Borough. That was the very thing to be 'regulated,'
 " not destroyed. But in regulating the wider thing, they might prohibit
 " a part, and therefore prohibition, even absolute, of a part of the subject-
 " matter to be regulated is no departure from 'regulation' of that subject- 25
 " matter. That was the first point distinctly determined by *Slattery*
 " *v. Naylor*"(13). *Higgins, J.*, illustrates the position by apposite
 illustration in *Barry's* case where he says: "If there were power by a
 " by-law to regulate milk-vending, the Council would have no power
 " to deprive any man of his right to make his living by selling milk, 30
 " but would have power to dictate by by-law the conditions of place,
 " time, manner, &c., under which milk might be sold"(14).

Regulation by means of a prohibition which is relaxed on the permit
 of the controlling body, or one of its officers, is a very common form of
 regulation. In the judgment of *Phillimore and Hamilton, JJ.*, in *Mitcham* 35
Common Conservators v. Cox(15), it is said: "Licenses or permits are
 " unobjectionable so far as they are part of the machinery of legitimate
 " regulation. As soon as they become mere means of discrimination
 " or hindrances in the way of one class from which other classes are free
 " they cease to be justifiable and cannot be required"(16). *Scrutton, J.*, 40
 said, citing from *De Morgan v. Metropolitan Board of Works*(17): By-
 " laws are a code of restrictions. Modes of user which, if enjoyed without
 " limitation as to time or place, would unduly interfere with the comfort
 " and enjoyment of others, such as riding, boating, cricketing, bathing,
 " and the like, are put under reasonable restrictions. It is equally 45
 " necessary that the holding of public meetings on the common should
 " be also put under regulation. And what can be a more reasonable
 " mode of regulating such meetings, than to require information before-
 " hand what the object and character of the meeting are, in order that
 " the board may be able to judge whether it is such as ought to be allowed 50

(10) (1916) 22 C.L.R. 340, 348.

(11) (1922) 31 C.L.R. 174.

(12) (1888) 13 App. Cas. 446.

(13) (1922) 31 C.L.R. 174, 188, 189.

(14) *Ibid.*, 206.

(15) [1911] 2 K.B. 854.

(16) *Ibid.*, 875, 876.

(17) (1880) 5 Q.B.D. 155.

- "on the common, and if so to prescribe reasonable limits as to time and place?" (18). Later, he says: "Again, it seems obvious that the conservators cannot put into by-laws all the terms on which each game is to be played, or each part of the common used for recreation. It must be sufficient for them to prohibit by by-law user of parts of the commons except by their permission and on terms granted by them, in other words, to take the course approved in *De Morgan v. Metropolitan Board of Works* (5 Q.B.D. 155) already cited" (19). The passage to which he refers (20) in the last-mentioned case (21) was a decision of *Lush and Manisty, JJ.*, delivered by *Lush, J.*, and is summarized as follows by *Scrutton, J.*: "There by a scheme under the Act of 1866 Clapham Common was dedicated to the use and recreation of the public as an open and unenclosed space for ever, to be regulated and managed by the board. The board made a by-law prohibiting the 'delivery of any public speech, lecture, sermon, or address of any kind or description whatever, except with the written permission of the board first obtained, and upon such portions of the common and at such times as may by such written permission be directed and sanctioned by the board.' This by-law was objected to as invalid, and it was argued, that the common having been 'dedicated to and for the use and recreation of the public as an open and unenclosed space for ever,' the board could not prevent the public from assembling there whenever they pleased for the purpose of hearing sermons, or lectures, or addresses, on any subject, religious, political, or otherwise. In giving judgment, *Lush, J.*, said: 'If this argument were sound it would follow that any number of public meetings might be held at the same time in various parts of the common, even to the extent of monopolizing the whole area, to the disturbance of the neighbourhood and the exclusion of that portion of the public who desired to use it for the purpose of recreation. We are satisfied that such was not the intention of the scheme which Parliament has sanctioned. Its object was to secure in perpetuity the common as a place which the public might use as of right for the purpose of recreation, and in order that all classes may at all times share in its enjoyment, the user of the common is necessarily placed under regulations'" (22).

- The same general principle was also considered by *Richmond, J.*, in *McGill v. Garbutt* (23) with reference to the regulation of street processions. The by-laws prohibited processions other than parades, &c., of volunteers, fire brigades, &c., funeral and school processions, except with the authority of the Borough Council. The defendants were members of the Salvation Army and took part in a procession, beating drums and blowing musical instruments, &c., whereby a crowd collected and traffic was impeded. The Magistrate held that the by-law was unreasonable and void, on the ground that the Council met only once a fortnight, which might be an unreasonable time for persons desiring to form a procession to wait for a license. The learned Judge, however, considered the general question as to the validity, and, in the course of his judgment, says: "The common law is the vigilant guardian of individual liberty, but for this very reason shows itself jealous of assemblages not under the control of some authority recognized by the State . . . it is undeniable that large and organized assemblages in the streets of a city for any particular purpose tend to excite to a violent opposition persons to whom the object

(18) [1911] 2 K.B. 854, 879.

(19) *Ibid.*, 882.(20) *Ibid.*, 878.

(21) (1880) 5 Q.B.D. 155.

(22) [1911] 2 K.B. 854, 878, 879.

(23) (1886) N.Z.L.R. 5 S.C. 73.

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aneous Ministries. Muslims were, of course, Ministers from all parties. This was

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It may be mentioned that the Ministries made enquiries and detailed reports to the respective Legislatures of impartial investigation. A member of the Harlal Nehru and as the latter had not fulfilled the engagement, who happened

"of the assemblage is obnoxious or distasteful . . . It would be
 "intolerable that any body of persons who might choose to associate
 "themselves for the purpose should have the absolute right to parade
 "the streets of a town in such numbers as to themselves might appear
 "suitable by day or by night with flags flying, or torches flaring, drums 5
 "beating and every kind of noisy accompaniment; and it is perfectly
 "certain any such right is wholly unknown to the common law . . .
 "The inhabitants of towns and cities have, as everybody knows, to submit
 "to many restrictions not imposed because not required in rural districts.
 "For the unrestricted liberty of one man in a community of ten means 10
 "the annoyance, danger, and so to speak servitude of all his neighbours"
 (24).

Moreover, it is to be noted that the by-law does not depend for its
 validity solely on s. 364 (18). The holding of public meetings on reserves,
 streets, or other public places is not only a matter affecting the regulation 15
 and management of the reserves, but may well be a matter of the good
 rule and government of the borough. Many of the cases refer to the power
 to make such a by-law in order to prevent the commission of nuisances
 by the blocking of ordinary street traffic on footpaths or streets, and
 so tending to create a nuisance, and to their tendency to provoke counter- 20
 demonstrations and disturbances of a violent kind, besides depriving other
 persons of their right to use the places in other ways that they may desire.
 Plainly, as indicated in the *Mitcham Common* case(25), control is necessary
 in the interests of good rule and good government.

The by-law, it seems to me, is also justified by subs. 4, which authorizes 25
 a by-law for the purpose of:

Regulating, controlling, or prohibiting any act, matter, or thing usually the
 subject of municipal regulation, control, or prohibition.

There can be no question that the holding of meetings in public places
 is usually the subject of municipal regulation and control, including 30
 this form of control by prohibition of use without permission. This
 very case illustrates that the by-law was considered advisable by the
 local authority in order to keep the streets free for the ordinary traffic,
 and that, in respect of this Reserve at least, was one of the purposes for
 passing it. Although the Magistrate has held in the present case that 35
 the evidence did not go so far as to prove that these meetings did interfere
 with the ordinary use of the street, he held that evidence might be available
 which would establish that.

It was suggested that the only way in which such a by-law might be
 validly made was by the City Council itself detailing a list of the places 40
 and times at which public meetings might be held. But, having regard
 to the large extent of modern cities, it seems clear that such a by-law,
 dealing with every street in the City, or prescribing certain places, would
 be impractical for many reasons, of which reference need only be made to
 the fact that existing conditions change from time to time, and, indeed, 45
 may change from day to day by reason of some particular work being
 done or other activity on or in the locality concerned. It seems obvious
 that the power to make by-laws in a form at least similar to this is essen-
 tial for the good rule and government of boroughs and cities.

The learned Magistrate further held that the by-law—even if it could 50
 have been supported under s. 13 (1) of the By-laws Act, 1910—was also
 invalid in so far as the discretion entrusted to the Town Clerk was so great
 as to be unreasonable. The reasons for this apparently were that the
 power left to the Town Clerk, in so far as it applied to all streets, public

(24) (1886) N.Z.L.R. 5 S.C. 73.

(25) [1911] 2 K.B. 854.

places, and reserves, was so wide and general as to be a complete delegation to the Town Clerk of all power. The learned Magistrate says: "While the right [of free speech] cannot, in my view, be exercised in public streets or reserves entirely without control or regulation, particularly in a modern city, the by-law under consideration is unreasonable and might well be a source of oppression, particularly in leaving, as it does, the right to grant permits under it to the unfettered discretion of the Town Clerk" (26). He refers, in support of this view, to the decisions in *Kruse v. Johnson* (27), *Grater v. Montagu* (28), *McCarthy v. Madden* (29), and *Hanna v. Auckland City Corporation* (30).

With all respect, it does not appear to me that these judgments support this view. In *Kruse v. Johnson* (31), it was said the particular by-law under consideration was held valid, and that the Court would be slow to hold a by-law invalid for unreasonableness. It is true that the Court said in the course of its judgment that a by-law "clearly involving an unjustifiable interference with the liberty of those subject to it" (32) would be invalid. For the reasons I have stated above, I do not see how this by-law, which makes provision for the use of the places dealt with at the discretion of the City Council's highest executive officer, can fairly be considered as clearly involving an unjustifiable interference with the citizens of Wellington.

Grater v. Montagu (33) decided that the by-law would be invalid if, upon the facts, "any reasonable man would consider that the by-law was oppressive" (34).

In *McCarthy v. Madden* (35), the judgment of *Denniston and Edwards, JJ.*, dealt with the general question as to when by-laws are to be considered unreasonable. That case was dealing with the use of the highway, and it was on that ground particularly that the Court held it should be "scrutinized with rather more care than other by-laws are scrutinized with" (36). It was held that the question of whether a by-law is reasonable or unreasonable is essentially one of fact, and the judgment considers general principles which do not seem to apply to such circumstances as the present. The ground upon which the by-laws in question there were held unreasonable may be shortly stated in the following extract from the judgment: "These by-laws unquestionably interfere with and abridge the public right to use the highways for the primary purpose of traffic. Do they produce a corresponding benefit to the inhabitants of the locality [the Riccarton Borough and the surrounding local body districts], in the sense which we have attached to those words?" (37). It was held that they produced no real benefit and would cause serious loss.

In *Hanna v. Auckland City Corporation* (38), the regulation prohibiting other than architects or registered civil or constructional engineers who were, in the opinion of the City Engineer, properly qualified from preparing plans for, and supervising the erection of, buildings or structural work was held unauthorized by s. 364 (1) or any other authority in the Act. The *ratio decidendi* is found in the judgment of *Sir Michael Myers, C.J.*, in which he said: "I can find no power conferred on the Council even of regulation or governance of the profession of an architect" (39).

(26) (1948) 5 M.C.D. 441, 447.
 (27) [1898] 2 Q.B. 91.
 (28) (1904) 23 N.Z.L.R. 904.
 (29) (1914) 33 N.Z.L.R. 1251.
 (30) (1945) 5 N.Z.L.G.R. 302.
 (31) [1898] 2 Q.B. 91.
 (32) *Ibid.*, 91.

(33) (1904) 23 N.Z.L.R. 904.
 (34) *Ibid.*, 907.
 (35) (1914) 33 N.Z.L.R. 1251, 1267.
 (36) (1904) 23 N.Z.L.R. 904, 906.
 (37) (1914) 33 N.Z.L.R. 1251, 1270.
 (38) (1945) 5 N.Z.L.G.R. 302.
 (39) *Ibid.*, 309.

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It was further held that the by-law left to the City Engineer a discretion so great as to be unreasonable, on the ground (a) that it was partial and unequal, (b) that it was repugnant to the general law, (c) that it was purporting to license one special class of architects, and that on a wrong ground, (d) that it was arbitrary in fixing the sum of £2,000, and (e) that the City Engineer is given what is practically a discretion to ignore the by-law whenever he thinks fit, and *also, whenever he thinks fit, to extend the operation of the by-law to cases which are not within its terms.* 5

The subject-matter and the terms of the by-law considered are so very different from those in the present case that I do not think the decision should be regarded as of assistance in the matters that fail to be considered on this appeal. This is particularly so as it was a by-law restricting the carrying on of a trade or profession. Freedom of trade has always been regarded by the law as a matter which public policy requires should be jealously safeguarded. A decision which deals with the limitations on a local body's right to prevent a man exercising his business or profession is so entirely different from the regulation of ordinary activities, apart from trade, that such a decision cannot, I think, be accepted as applying to control of the exercise of such other activities. No authority was, or could be, I think, cited that public policy required the same protection to be afforded to a claim to a right of public assembly in public places for the purpose of a public address or discussion. Indeed, the course of the law, as is indicated in the passages I have quoted above, has inclined, for the reasons stated, in the opposite direction. Experience has shown that such assemblies have a tendency to develop into riots, cause disturbances, provoke breaches of the peace, and create a public nuisance generally by impeding highways and the general use of the public places. 10 15 20 25

The question as to whether the by-law is unreasonable, in the circumstances of the present case, in my view, may well require a preliminary consideration of questions of law. The Magistrate has assumed that the right of public assembly and public speech is a right equivalent to other rights that can be enforced, and which are not subject normally to control by others. It has been held that it is not unlawful to make a public speech in a public place, and the exceptional remedy of injunction will not be granted against the continuance of such addresses which do not tend to provoke breaches of the peace or cause a nuisance: *Llandudno Urban District Council v. Woods*(40). But this is not a right to require the use of such a place at the will of the person wishing to speak. No person has the right to claim to be entitled to address a public gathering where and when he likes on a public reserve or place. The same decision said, too, that, by virtue of by-laws, the Council had the right to prevent any public address from being delivered on a promenade adjoining. 30 35 40

Isaacs, J., has dealt also with the test of unreasonableness in *Melbourne Corporation v. Barry*(41). Referring to the decision of the Privy Council in *Slattery v. Naylor*(42), he says: "Then 'unreasonableness' was urged on the ground of the prohibition—if any prohibition were necessary—being too absolute. This was disposed of by pointing out the difference between the old authority by charter and the analogous powers of newer corporations similarly treated, on the one hand, and the confidence reposed by later legislation in local government bodies created for self-government, on the other hand. As to the latter, 'unreasonableness' was regarded as probably open only in very extreme 45 50

(40) [1899] 2 Ch. 705, 709.

(42) (1888) 13 App. Cas. 446.

(41) (1922) 31 C.L.R. 174, 189.

"cases. Evidently their Lordships were thinking of 'unreasonableness' so extreme as manifestly to exceed the contemplated ambit of power" (43).

- To the same effect, and very apposite on the whole appeal, is the decision in *Aldred v. Miller* (44), where Lord Atness says: "We are concerned with a by-law which in effect says to each member of the public, 'before holding a meeting on Glasgow Green you must first obtain the permission of the Parks Committee.' The appellant said that it is not suggested that in his case he or his colleagues were guilty of using inflammatory or seditious language, or that they menaced public order, far less that they were guilty of a breach of the peace. All that is true. But the Magistrates have said that, as a matter of domestic administration, a permit must be obtained for a meeting on Glasgow Green, whatever its object or character may be. I cannot hold that that is an unreasonable or an arbitrary proceeding. It is a mistake to represent it as a withdrawal of the right of free speech. There is no interference with that right—with the right of the speaker to express any opinion which he pleases. It is also a mistake to represent it as a prohibition of public meetings. It merely requires permission to be obtained in order to hold them. It does not prevent, but it regulates the exercise of the right. *Non constat* that, if the appellant had applied for permission to take part in the meeting referred to, that permission would have been refused. The by-law is, as Mr. Moncrieff said, an assertion of the paramount civic right, that each citizen, in the exercise of his freedom, shall not infringe the freedom of others. The by-law, in point of fact, so far from prohibiting public meetings, affords facilities for holding them. So far from being aimed against the public, it appears to be conceived in the interest of that larger section of the public who frequent Glasgow Green, and who are not interested in public meetings and demonstrations. In these circumstances I am of opinion that no ground has been stated upon which we can hold this by-law to be unreasonable or repugnant to the general law, or *ultra vires*" (45). Lord Anderson says: "It is plain that the appellant labours under certain misconceptions in connection with his prosecution. What these misconceptions are may best be gathered by reference to his 'Open Letter,' which is printed as an appendix to the stated case. This production is headed 'Glasgow Free Speech Fight,' the suggestion being that the Magistrates have challenged the exercise by the appellant of his right of free speech. This is not the case. If the appellant follows the ordinary course of hiring a hall for his meetings, or if he holds a meeting under permit on Glasgow Green, there will be no interference with him on the part of the public authorities. Again, the appellant, in his 'Open Letter,' represents that the prosecution is an attempt to interfere with what he terms 'the age-long right of public meeting' on Glasgow Green. Clearly this is a complete misrepresentation of the purpose of the prosecution. I gather that the Magistrates recognize the existence of the right of public meeting on Glasgow Green by reason of the fact that, with reference to this park alone of all the public parks of Glasgow they issue permits for the holding of public meetings. But it seems to me to be obvious that the exercise of this right must be regulated. The paramount purpose for which Glasgow Green exists is recreation, not the holding of public meetings. If there be indiscriminate and uncontrolled assertion of the right of public meeting, this would, or might, defeat the paramount purpose for which the Green

(43) (1922) 31 C.L.R. 174, 189.

(45) *Ibid.*, 27, 28.

(44) [1925] S.C. (J.) 21.

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"exists. Surely, then, it is proper that the Magistrates should decide
 "when and by whom the right of public meeting should be exercised.
 "The 'Open Letter' goes on to refer to the conviction of an individual
 "named Edward Rennie, and makes the assertion that '*for the offence*
 "of addressing a lawful meeting Rennie is being treated as a criminal in 5
 "'Barlinnie prison.' This is manifestly another misconception. What
 "Rennie is being punished for is contravention of the by-laws for the
 "management and regulation of the public parks in Glasgow. He
 "has been convicted, not for holding a meeting, but for doing so without a
 "magisterial permit"(46). 10

But, apart altogether from this aspect, it would appear that it would
 impose an unnecessary and burdensome obligation on the members if
 the Council itself, or a sub-committee, was required to consider each
 application. It may be that a small sub-committee of its senior officers
 would be an almost ideal body. That is a matter for the local body to 15
 determine. But s. 13 (2) of the By-laws Act, 1910, in itself shows that
 a discretion was intended to be entrusted to the officer or other person or
 persons to which powers, under a by-law, are delegated. At least
 three matters are to be weighed in considering whether such delegation
 is reasonable: (a) the nature of the by-law; (b) the character of the 20
 delegation; and (c) the status of the delegate: *Bremner v. Ruddenklau*
 (47). With regard to the first and second, it may be said that this type
 of by-law is fairly common in relation to streets and reserves, and the
 delegation is limited. There is no attempt to control the use of the
 reserves by individuals for their own personal recreation or enjoyment. 25
 With regard to the third, it appears that no higher executive officer
 than the Town Clerk could be chosen to exercise the discretion. It is
 apparent from the facts stated in this case that the Director of Reserves,
 the By-laws Committee, and the Reserves Committee were consulted
 by him. Such a course indicates that the application was reasonably 30
 and properly considered. A proposed meeting may affect either the
 use of the reserve, or the street or streets adjoining, by the public generally,
 or other meetings or processions for which permits have been given,
 or some proposed work to be done at the particular place at the time
 referred to in the application by some City department. Other factors 35
 may exist that make it impossible or highly inconvenient to grant a
 permit. All these factors can be best considered by a committee of
 responsible officers, or a responsible officer. He is always subject to
 supervision by the City Council itself, of which he is the officer, and which
 may well lay down general principles, if necessary, upon which he should 40
 act. If he proves an unsuitable delegate, the by-law can be altered.

In all these circumstances, I fail to see any ground for saying that the
 discretion entrusted to this senior and responsible officer is so wide as to
 be unreasonable. Indeed, it appears to me to be a most businesslike
 and reasonable method of controlling and regulating the use of reserves, 45
 streets, and other public places for the purpose of addresses or gatherings.
 Nor can it be said to be uncertain or indefinite. The condition for use
 is the permit of the Town Clerk. No doubt the reasons that might lead
 to its being refused are not set out in detail; but that appears probably
 impracticable, and certainly unnecessary. Indeed, this argument 50
 was really addressed to showing that the delegation was unreasonable.

For these reasons I think the Magistrate's decision was erroneous,
 and the appeal must be allowed and the information remitted to him,
 with the direction that the by-law is *intra vires* and reasonable.

(46) [1925] S.C. (J.) 21, 29.

(47) [1919] N.Z.L.R. 444, 461, 471.

The same considerations apply to the appeals by Mrs. Birchfield and Mr. McAra, and the same course should, I think, be followed with regard to them.

Appeal allowed.

Solicitor for the appellant: *City Solicitor* (Wellington).

Solicitors for the defendants McAra and Birchfield: *Duncan Matthews and Taylor* (Wellington).

[IN THE MAGISTRATES' COURT.]

DAKEN v. HEAD.

1948. June 25, July 8, before Mr. J. H. LUXFORD, S.M., at Auckland.

Road Transport—Taxicab—Offences—Taxi-driver failing to Conduct himself in Orderly Manner—Ingredients of Offence—Failure to comply with Conditions imposed in Passenger-service License—Proof of License and Conditions imposed therein—"Orderly"—Taxicab Regulations, 1939 (Serial Nos. 1939/218, 1941/44), Reg. 10 (2) (a).

An information, purporting to be laid under Reg. 4 (2) of the Taxicab Regulations, 1939, against the defendant, charged him that he "being a licensed taxi-driver engaged in his lawful occupation did fail to conduct himself in an orderly and civil manner."

Held, 1. That the information did not disclose an offence, as it did not allege, in pursuance of Reg. 10 (2) (a), that he failed to comply with a condition imposed in a passenger-service license duly issued by a competent authority in respect of a taxicab-service, while engaged in his employment as driver of a taxicab used in connection with the licensed service.

2. That an essential ingredient of the offence is the existence of a current passenger-service license, and the onus is on the prosecution to prove the license and the conditions imposed therein; and no proof was given of the passenger-service license under which the taxicab was operating.

Semble, The test of whether or not conduct is "orderly" within the meaning of the phrase "in an orderly and civil manner" in Cl. 4 (2) of the First Schedule of the Taxicab Regulations, 1939, is: Did the conduct unduly disturb any other person, or was it likely to do so?

INFORMATION that the defendant on March 30, 1948, "being a licensed taxi-driver engaged in his lawful occupation did fail to conduct himself in an orderly and civil manner." The information purported to be laid under Reg. 4 (2) of the Taxicab Regulations, 1939 (Serial No. 1939/218).

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homogeneous Ministries of Muslims were, of course, Ministers from a party. This was the hint given to the full employment to the minorities had more Ministers of the eleven majority communities in Congress Provincial communities. Ministries in two more and Assam. To go further. In the four Ministers including Muslims, while Muslim Ministers made fantastic assertions

at the middle of July months when on 20th Muslim League passed its complaints have treatment and injustice Congress Government were workers and solves that a special [owing] members inquiries and to take to submit its report on the committee which was into the details. It may be mentioned that the Ministries made enquiries giving detailed reports to the respective Legislative Councils of impartial investigation member of the Harlal Nehru and as the latter had not fulfil the engagement, who happened to be a "double agent," p. 114

The prosecution proved that Miss X. engaged the taxi driven by the defendant at 4 a.m. on March 30, 1948. Miss X. had gone to the Auckland Railway Station with a friend who was leaving by the *Herald* train. She then desired to return to her home in the suburbs, and engaged the taxi for that purpose. She got into the back seat. The taxi proceeded to Queen Street, and the defendant asked Miss X. if she would mind if he pulled up to buy a paper at the *Herald* office. She said that would be all right, and asked him to buy a paper for her. When the defendant returned to the taxi, he asked Miss X. to sit in front with him. She refused at first, but, as he persisted with the invitation, she finally consented, because, as she says, she was frightened that he might refuse to drive her to her house and she might not be able to get another taxi. The taxi then drove off. On the way, the defendant pestered Miss X. with his attentions, and, when nearing her destination, he pulled up and said he would not go any further unless she told him her name. She promptly said "Pat," being the first name that came into her head. The defendant tried to get Miss X. to give further information about herself, but she refused. She then got out of the taxi, took its number, went to her home, and later reported the matter to the Police.

Terry, for the defendant.

Cur. adv. vult.

LUXFORD, S.M. At the hearing, I intimated that, in my opinion, the defendant had failed to conduct himself in an orderly manner. The word "disorderly" was considered in *Campbell v. Adair* ([1945] S.C. (3). 29), where it was held that it is a word of very wide comprehension, a word which indicates less aggressive conduct than would be required to constitute a breach of the peace. The test, in my opinion, is, did the conduct unduly disturb any other person, or was it likely to do so? The defendant is a married man, and I am satisfied on the evidence that his words and conduct were in pursuance of an improper motive without any encouragement from Miss X. There can be no doubt that she was unduly disturbed by the defendant's conduct, although she handled the situation very cleverly indeed.

I reserve my decision in order to consider whether or not the information discloses an offence.

The Taxicab Regulations, 1939, were made pursuant to the Transport Licensing Act, 1931, as amended by the Transport Law Amendment Act, 1939. The Amendment Act, 1939, extended the meaning of the expression "passenger-service vehicle" to include a taxicab. The regulations modify a number of other regulations, in so far as they apply to taxicabs, and by Reg. 6 provide that:

"It shall be a condition of every license (whether inserted therein or not) issued for any taxicab-service, that the special conditions set out in the First Schedule hereto shall apply to the service unless otherwise provided by the express terms of the license."

The granting of the license is governed by Part II of the Transport Licensing Act, 1931, which makes it an offence to carry on a passenger service "otherwise than pursuant to and in conformity with the terms of a passenger-service license granted under this part of this Act."

The Taxicab Regulations, 1939, created a peculiar legal position, in that they imposed special conditions to every license issued for a taxicab-service, but include in the conditions obligations on drivers of taxicabs as well as on licensees. As the position then stood, the only penal sanction for a breach of the special conditions was the penalty for operating a service otherwise than in conformity with the terms of the license. The regulations, however, were amended by the Taxicab Regulations, 1939, Amendment No. 1 (Serial No. 1941/44), which added (*inter alia*) a new regulation (Reg. 10 (2) (a)), which is as follows:

"Every person who

"(a) Fails to comply with any condition, duty, or obligation imposed by these regulations, or imposed in any license under these regulations . . . shall be liable for every such breach to a fine not exceeding £10."

In order to convict a person of the offence created by this regulation, there must be an information alleging that he failed to comply with a condition imposed in a passenger-service license duly issued by competent authority in respect of a taxicab-service, while engaged in his employment as driver of a taxicab used in connection with the licensed service. An essential ingredient of the offence is the existence of a current passenger-service license, and the onus is on the prosecution to prove the license and the conditions imposed therein.

The present information apparently has been drawn on the assumption that Reg. 4 of the 1939 Regulations itself creates an offence, and consequently the information makes no reference to the passenger-service license under which the taxicab was operating; nor was the license produced as part of the prosecutor's case.

I must, therefore, dismiss the case on two grounds—(i) the information as drawn does not disclose an offence; (ii) no proof was given of the passenger-service license under which the taxicab was operating.

Information dismissed.

Solicitor for the defendant: J. K. Terry (Auckland).

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BLAND *v.* BROOKER.

1948. September 15, 22, before Mr. J. H. LUXFORD, S.M., at Auckland.

Motor-vehicles—Illegal Parking—Notice to Owner informing him of Offence and asking for Information as to Driver's Identity—Notice sent by Registered Acknowledgment Receipt Letter—No Reply or Information supplied—Signature on Receipt not proved to be Signature of Owner—Offence not proved—Motor-vehicles Act, 1924, s. 32 (2).

Before a conviction under s. 32 (2) of the Motor-vehicles Act, 1924, can be entered against the owner of a motor-vehicle for failing to give all the information in his possession which may lead to the identification and apprehension of a driver who has committed an offence under the statute, there must be clear proof that the notice was received by him, and that a reasonable time thereafter in which the information could have been given has elapsed.

The production of a receipt given for a registered letter to a postal officer purporting to be signed by the person to whom the letter was addressed is not *per se*, in the absence of statutory authority, proof that the person received the letter. It is necessary to prove that the signature on the receipt is the signature of the person to whom the letter was addressed.

Semble, The authority of a traffic officer, under s. 32 (2) of the Motor-vehicles Act, 1924, and under Reg. 3 (2) of the Traffic Regulations, 1936, to enforce the provisions of that statute or those regulations cannot be exercised anywhere except upon a road, or unless at the time he so exercises his authority he is carrying his warrant of appointment.

Quaere, Whether the making of a request by a traffic officer under s. 32 (2) of the Motor-vehicles Act, 1924, by letter sent in the ordinary course of the post is valid.

INFORMATION charging the defendant with a breach of s. 32 (2) of the Motor-vehicles Act, 1924.

The evidence showed that the defendant was the owner of a motor-car which was illegally parked in Vulcan Lane at the City of Auckland on May 7, 1948.

Traffic Inspector Knight reported the offence to the Superintendent of Traffic appointed by the Auckland City Council, who sent the following letter to the defendant on May 19, 1948:

"Please furnish to my department with the full name and full private address of the person driving or in charge of your motor-car No. 135657 Vulcan Lane at 10.30 a.m. on 7/5/1948. The information is required in connection with a report submitted to this office that your vehicle was left stationary from 10.30 a.m. to 12 noon in a "ten-minute" area."

No reply was received to this letter, nor to two further letters which were sent on June 21 and on July 19. The third letter was sent by A.R.

registered letter. The advice of delivery was duly returned to the Traffic Department of the Auckland City Council, and bears the signature of "M. J. Brooker," whereas the defendant is "P. M. Brooker." The second and third letters are as follows:

"Further to my letter of 19/5/1948 requesting the full name and full private address of the person driving or in charge of your motor-car No. 135657 in Vulcan Lane at the City of Auckland on May 7, 1948, I have to remind you the information has not yet been furnished. I respectfully draw your attention to the provisions of s. 32 (2) of the Motor-vehicles Act, concerning the furnishing of such information [s. 32 (2) then follows in full]. It is probable that the matter has been overlooked by you, and I would appreciate your early reply."

Cur. adv. vult.

LUXFORD, S.M. The provisions of s. 32 (2) are as follow:

"The owner of any motor-vehicle shall, on being informed of any offence alleged to have been committed by the driver of such motor-vehicle while in charge thereof . . . and on being requested so to do by any constable or by any person duly appointed to control or inspect traffic, give all information in his possession which may lead to the identification and apprehension of the driver, and if the owner fails so to do he commits an offence against this Act."

The first question is whether a request in the form of a letter is a request within the meaning of the section. In *Short v. Goodsons, Ltd.* ((1940) 35 M.C.R. 108), the request was in the form of a notice, which was acknowledged in writing by the defendant. The validity of the request was not considered, and the defendant was convicted on the ground that it did not give all the information in its possession.

The Motor-vehicles Act, 1924, s. 36 (1) (t), empowers the Governor-General to make regulations:

"Generally making provision for all matters deemed necessary for the due administration of, and for giving full effect to the provisions of, this Act."

The provisions of Reg. 3 of the Traffic Regulations, 1936, dealing with "administration" were enacted under the powers conferred by s. 36 (1) (t). Clause 2 of Reg. 3 enacts that:

"A traffic inspector appointed by the Minister or the Main Highway Board or a police officer shall be entitled to exercise the powers hereby conferred on him upon any road."

Clause 3 of the same regulation enacts that:

"Every traffic inspector while carrying his warrant of appointment and every police officer is hereby authorized to enforce the provisions of the said Act and these regulations, and in particular may at any time . . ."

Then follow a number of matters which are not relevant to the present case.

It would seem from these two clauses that the authority of a traffic officer to enforce the provisions of the Act or the Regulations cannot be exercised anywhere except upon a road and unless, at the time he so exercises his authority, he is carrying his warrant of appointment.

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If this is the correct position, the work of police and traffic officers in obtaining evidence of identification of drivers will be made much more difficult, until the regulation is amended by the addition of express provisions as to mode and manner in which the request may be made. This question was not argued at the hearing, and, had it been necessary for me to give a substantive finding on the point, I would have stood the case over to enable the prosecutor to instruct the City Solicitor to submit argument. Consequently, my comments must be regarded as merely expressing a doubt as to the validity of making a request by letter sent in the ordinary course of the post.

I will now assume that the request may be made by sending a written notice to the owner. Before a conviction can be entered against the owner for failing to give all the information in his possession, which may lead to the identification and apprehension of the driver, there must be clear proof that the notice was received by him, and that a reasonable time thereafter in which the information could have been given has elapsed.

In the present case, I do not know whether the defendant received the notice or not, or whether the contents of the notice ever came to his knowledge. In the absence of statutory authority, similar to that contained in the Magistrates' Courts Act, 1928, s. 83, the production of a receipt for a registered letter given by a postal officer, and purporting to be signed by the person to whom the letter was addressed, is not (*per se*) proof in judicial proceedings that that person received the letter. It is necessary to prove that the signature on the receipt is the signature of the person to whom the letter was addressed.

For these reasons, I must dismiss the information.

Information dismissed.

WAITEMATA COUNTY v. CHOLMONDELEY-SMITH.

1948. June 15, 28, before Mr. J. H. LUXFORD, S.M., at Auckland.

Rating—Sanitary Rate—Rate imposed by Council Resolution—Whether Duly levied—Counties Act, 1920, s. 122 (2), 123—Health Act, 1920, s. 140.

On August 3, 1945, the County Council resolved "in terms of "the Health Act, 1920, and s. 123 of the Counties Act, 1920, to make "and levy a uniform charge or separate rate of £1 8s. for service in "respect of such property in the sanitation area constituted by by- "law in the Takapuna Riding, as has a house erected thereon." The defendant contended that the charge was a separate rate, and could not by reason of s. 122 (2) be made or levied except on a petition signed by a majority of the ratepayers in the riding. It was common ground that no petition had been signed in accordance with s. 122 (2).

Held, That, as the annual uniform charge which, by s. 123 (2) of the Counties Act, 1920, a County Council is authorized to make for sanitary services is deemed for all purposes to be a separate rate, the rate in question was duly levied in accordance with the powers conferred on the Council by s. 140 of the Health Act, 1920.

ACTION claiming £4 14s. 8d., being the amount of the sanitary rate, together with the statutory penalty for non-payment, alleged to be owing by the defendant in respect of land owned by him in the Waitemata County.

On August 3, 1945, the County Council resolved :

" in terms of the Health Act, 1920, and s. 123 of the Counties Act, 1920, to make and levy a uniform charge or separate rate of £1 8s. for service in respect of such property in the sanitation area constituted by by-law in the Takapuna Riding, as has a house erected thereon."

The defendant contended that the charge was a separate rate, and could not, by reason of s. 122 (2), be made or levied except on a petition signed by a majority of the ratepayers in the riding. It was common ground that no petition had been signed in accordance with s. 122 (2).

Sanderson, for the plaintiff.

Davidson, for the defendant.

Cur. adv. vult.

LUXFORD, S.M. A County Council has power under s. 122 (1) by special order to make and levy a special rate upon all rateable property within such portion of the county as is defined by the special order. The second subsection, however, enacts that no such special order shall be made :

" save upon a petition signed by a majority of the ratepayers within the riding or other defined portion of the county proposed to be rated."

The Council contends that the resolution of August 3, 1945, was not made under the powers conferred by s. 122, but under the powers conferred by s. 123 of the Counties Act, 1920, and by s. 140 of the Health Act, 1920. Consequently, the provisions of s. 122 of the Counties Act have no application to the sanitation rate it now seeks to recover from the defendant.

A County Council is given special powers by s. 123 of the Counties Act, 1920, to levy a sanitation rate. The first subsection provides that :

" Where the Council itself undertakes or contracts for the removal of house refuse . . . for the county or any part thereof, the Council may in respect thereof make and levy in any year a separate rate of such amount as will, in the opinion of the Council, be sufficient to cover the estimated expenditure of the Council for that year in respect of the works for which the rate is levied :

" Provided that such rate shall be levied only upon such properties as have a house or houses erected thereon."

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The second subsection provides that :

“ In lieu of making any such rate the Council may levy a uniform annual charge. Such charge shall for all purposes be deemed to be a separate rate.”

I propose first to consider s. 123 without reference to the relevant provisions of the Health Act. Subsection 1 empowers a County Council to make or levy a separate rate to cover the estimated expenditure of the Council for the year in which the rate is levied, for carrying out the specified work. There is nothing in the subsection authorizing the Council to levy the rate on property in any defined portion of the county. Consequently, the special rate must be levied on all rateable property in the whole county, saving only those properties which have no house erected thereon. In order to levy the rate on property in a defined portion of the county only, it is necessary for the Council to take the steps prescribed by s. 122—namely, to levy the rate by special order upon a petition signed by a majority of the ratepayers in the defined portion.

Subsection 2 empowers the Council to levy a uniform annual charge in lieu of making a separate rate, but declares that the annual charge “ shall for all purposes be deemed to be a separate rate.” The expression “ uniform annual charge ” does not, in my opinion, mean a uniform annual recurring charge, but is limited to the rating year in which the charge is made. The charge, being deemed for all purposes to be a separate rate, is subject to the provisions of s. 51 (a) of the Rating Act, 1925, which requires a rate to be “ for a year or some period less than a year.” The Amendment Act, 1929, makes special provision for levying annual recurring rates, but omits to include a charge levied under s. 123 (2). Further, there is nothing in subs. 2 authorizing the Council to levy the charge on properties in any defined portion of the county. Indeed, the expression itself indicates that, if the charge is levied it must be uniform in respect of all rateable property in the county. It may well be that, by reason of the subsection declaring that the charge “ shall for all purposes be deemed to be a separate rate,” the Council could by special order, and on a petition signed by a majority of the ratepayers in a defined portion of the county, limit the charge to rateable property within that portion ; but of course that has not been done.

It seems, therefore, that, if the Council relied on s. 123 alone, I would have to hold that the sanitary rate claimed by it is irrecoverable, because it was not made and levied in accordance with the statute.

There is nothing in the Counties Act specifically authorizing a Council to carry out the work referred to in s. 123. That section merely provides a means of raising the necessary money to pay for the work. The authority to do the work comes from s. 33 of the Health Act, 1920. That Act itself makes special provision in s. 140 for the levying of rates to pay any expenses incurred by a local authority in carrying out any of the provisions of the Act. The second subsection of s. 140 enacts that, in order to meet any expenses incurred by a local authority in carrying out any of the provisions of the Act, it may :

“ whether before or after such expenses have been incurred, in addition to its other rating-powers, make and levy by resolution a separate rate of such amount as may be necessary.”

The third subsection enacts that :

"Where such expenses are incurred for the benefit of portion only of the district of the local authority, any separate rate under this section may be made and levied on that portion only."

Where the local body is a County Council, the "separate rate" which it becomes entitled to levy includes, in my opinion, the uniform annual charge referred to in s. 123 (2) of the Counties Act. It is true that s. 51 (d) of the Rating Act, 1925, enacts that :

"In the case of every rate, that it be of a stated amount in the pound on the rateable values of the rateable property as appearing in the valuation roll for the time being in force :

"Except as otherwise provided in the case of a water rate or other rate fixed by any Act or Ordinance."

The words "fixed by any Act" should be construed as "fixed in accordance with any Act." It would not be practicable to fix the amount of the water rate which can be levied by each and every local authority in the Dominion. The provisions of ss. 51-59 of the Rating Act regulate the procedure to be adopted by local authorities when making rates, and it would be inconsistent with the purpose of those sections to construe the exception to s. 51 (d) in a way that would prevent a local authority from determining each year the amount to be charged for water or other services in accordance with any other Act.

The uniform annual charge which a County Council is authorized to make for sanitary services is, as I have already pointed out, deemed for all purposes to be a separate rate. For this reason, I must hold that, as it was levied "by resolution," it was duly levied in accordance with the powers conferred on the Council by s. 140 of the Health Act, 1920.

For these reasons, judgment must be entered for the plaintiff.

Judgment for the plaintiff.

Solicitor for the plaintiff: *R. C. J. Sanderson* (Auckland).

Solicitors for the defendant: *Milne and Meek* (Auckland).

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FLETCHER v. JACK.

1948. April 27, before Mr. S. L. PATERSON, S.M., at Cambridge.

Motor-vehicles—Traffic Regulations—Offences—Overtaking Vehicles—
“Clear view of the road and the traffic thereon”—*Scope of Regulation—*
Traffic Regulations, 1936 (Serial No. 1936/86), Reg. 14 (10) (b).

The dominating words of Reg. 14 (10) (b) of the Traffic Regulations, 1936, “a clear view of the road and the traffic thereon,” do not mean “a road clear of traffic,” or “a clear road,” because the view which is the deciding factor is not only a view of the road but also of the traffic thereon.

Archer v. Ramstead ((1940) 1 M.C.D. 342) discussed).

Semble, To attempt to overtake a vehicle when another vehicle is approaching is *prima facie* negligent or dangerous if the approaching vehicle is sufficiently near to cause danger, but this is independent of Reg. 14 (10) (b), though, in an action for damages based on negligent driving, that regulation may be looked at as an illustration of what may amount to negligence.

Suridge v. Hercock ([1939] G.L.R. 521) referred to.

INFORMATION charging the defendant with overtaking a vehicle proceeding in the same direction when he did not have a clear view of the road and the traffic thereon for a distance of at least 300 ft. in the direction in which he was travelling, contrary to cl. (10) (b) of Reg. 14 of the Traffic Regulations, 1936. This charge was laid in the same words as those of the regulation, so that there was no need to repeat them. The evidence for the prosecution showed that the Traffic Inspector was driving along Grey Street, Cambridge, approaching the intersection of that street and the main Hamilton-Cambridge road, when he stopped to yield the right of way to a car driven by a Mr. Wasson approaching from his right, and then about 150 ft. from the intersection. At the same time, another car was approaching the intersection along the Hamilton road on the Inspector's left, travelling in the opposite direction to Wasson and at about the same speed. After the Inspector had stopped, the car driven by the defendant came from behind Wasson's car, overtook it on the intersection, and then, to avoid the car approaching from the opposite direction, swerved sharply in front of Wasson's car, causing it to pull off the sealed surface of the road to avoid a collision. According to Wasson, at the time the defendant passed him, the cars were practically three abreast on the intersection.

The road at this place was straight and level for upwards of a mile, and there was nothing to obscure the view of persons using it. The defendant, therefore, had a clear view of the road and the traffic thereon for a distance of over 300 ft. in the direction in which he was travelling.

Garrard, for the defendant.

PATERSON, S.M. (orally) [After stating the facts, as above:] Before the luncheon adjournment, I said that I was inclined to agree with Mr. Garrard's submission that the evidence for the prosecution did not support the charge laid in the information, but that I could not decide the matter until I had an opportunity of considering the case of *Archer v. Ramstead* ((1940) 1 M.C.D. 342), relied on by Inspector Fletcher. I have been able to secure a copy of the report during the adjournment, and my reading of it confirms my previous opinion.

The prosecution contends that, because another car was approaching the cars of Wasson and the defendant, the latter had not a clear view of the road and the traffic thereon for a distance of over 300 ft., and for this proposition he relies on *Chalmers and Dixon's Road Traffic Laws of New Zealand*, 187, 188, and the case of *Archer v. Ramstead* ((1940) 1 M.C.D. 342) cited therein. This, however, is not what that case decides, and the extract from it quoted in *Chalmers and Dixon's Road Traffic Laws of New Zealand* is apt to be misleading. In passing it should be noted that the Supreme Court case *Suridge v. Hercock* ([1939] G.L.R. 521, 531), also quoted in *Chalmers and Dixon's Road Traffic Laws of New Zealand*, 186, has nothing to do with the regulation in question.

Archer v. Ramstead ((1940) 1 M.C.D. 342) must be read with reference to the facts involved in that case. Briefly, these were that the defendant, while travelling in a stream of traffic, drew out and accelerated to pass the vehicles in front. At the time of pulling out, he had a clear view of the road ahead for about 440 ft. He continued to travel parallel with the line of traffic approaching a bend until he no longer had a clear view of the road ahead for 300 ft. The question was raised, as stated by the Magistrate, as to whether, in those circumstances, an offence had been committed, and the Magistrate held that it had. This is all the case decides.

What the Court decided in effect was that the word "overtake" connotes a completed act, and that an attempt to pass continues until the act of passing is completed, and that a motorist is prohibited by the regulation from continuing with his attempt once his clear view of the road drops below 300 ft. When the learned Magistrate said, "The only reasonable interpretation to place on this regulation is, I think, this: that if when a motorist commences his overtaking movement of any vehicle ahead of him he has a clear view of the road for 300 ft., then he is justified in completing that movement and passing the other vehicle only if the road continues to be clear" (*ibid.*, 343), he meant rather "if he continues to have a clear view of the road for 300 ft." These words were not necessary for the decision, and were, therefore, *obiter dicta*, and, if the learned Magistrate meant that the presence of an approaching vehicle within 300 ft. meant that there was no longer a clear view of the road for 300 ft., then such statement was *per incuriam*.

The issue in that case and the present one is whether there has been a breach of the regulation, and not whether the defendant has been guilty of negligent or dangerous driving. The evidence in this case discloses a *prima facie* case of highly negligent driving, and the defendant should have been charged accordingly. On the facts, the defendant could have been charged with breaches of Reg. 14 (3) and (10) (a).

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The regulations merely prescribe a driving code, breaches of which may or may not amount to negligent driving. They are not meant to lay down all conditions under which driving is negligent. To attempt to overtake a vehicle when another vehicle is approaching is *prima facie* negligent or dangerous if the approaching vehicle is sufficiently near to cause danger. This is quite independent of the regulations, which might, however, be looked at, as was done by *Johnston, J.*, in *Suridge v. Hercock* ([1939] G.L.R. 521, 531), as an illustration of what might amount to negligence. The dominating words of the regulation are "clear view of the road and the traffic thereon." These words cannot mean "road clear of traffic," or "clear road," because the view which is the deciding factor is not only of the road but also of "the traffic thereon."

For these reasons, I uphold Mr. *Garrard's* contention, and the information will be dismissed.

Information dismissed.

Solicitors for the defendant: *Kingsford and Garrard* (Cambridge).

PALMERSTON NORTH CITY CORPORATION *v.* PLIMMER.

1948. April 6, 14, before Mr. J. R. HERD, S.M., at Palmerston North.

Local Authorities (Members' Contracts)—Candidate nominated for City Council Elections—Goods ordered from Company of which Candidate a Member—Candidate elected next day as Member of Council—Payment made after his taking Office—Goods ordered for Domain Board whereof control vested in City Council—Resignation of Councillor on ascertaining Position—Ouster from Office—Local Authorities (Members' Contracts) Act, 1934, s. 3—Municipal Corporations Act, 1933, s. 7.

The words of s. 3 of the Local Authorities (Members' Contracts) Act, 1934, "any contract made by or on behalf of the local authority" "if the payment made or to be made by or on behalf of the local authority" cover the case where the contract is made by a City Council as agent for a Domain Board, the control of which is vested in the Council acting as the Domain Board, or acting in its capacity as such Board.

A candidate for election to the Palmerston North City Council, nominated on October 28, 1947, was a shareholder in a company having less than twenty members. On November 18, the City Council by an order form of that date signed by the City Engineer ordered certain goods from the Manawatu Welding and Engineering Co., Ltd.; on November 19, respondent was elected a member

of the Palmerston North City Council; on November 26, he took office, not being aware of the order made upon the company; on December 31, an invoice was made by the company as against the City Treasurer, Palmerston North, for the goods referred to in the order form, charging £24 18s.; on January 13, 1948, the Town Clerk became aware that the respondent was a member of the company; on January 14, the goods were delivered; and, on February 5, the respondent tendered his resignation as a councillor.

It was admitted that the goods were ordered for the Pohangina Valley Domain, a reserve administered by the Pohangina Valley Domain Board, the control of which reserve is vested in the Palmerston North City Council acting as the Pohangina Valley Domain Board, membership of which is possible only by virtue of membership of the City Council.

On an application under s. 47 of the Municipal Corporations Act, 1933, that the respondent be ousted from office as a councillor of the Palmerston North City Council,

Held, adjudging the respondent to be ousted from office, 1. That the Board was not a separate entity for which the Council acted as agent only; and it was irrelevant that the contract was made on behalf of another local authority.

2. That the respondent's lack of knowledge of the contract was not a relevant factor.

3. That a person who is disqualified from office in a local authority cannot resign that office.

In re Denize (1921) 16 M.C.R. 31 applied.

APPLICATION, made under s. 47 of the Municipal Corporations Act, 1933, that the respondent be adjudged to be ousted from his office as a Councillor of the Palmerston North City Council upon the grounds that the respondent at the time of his election was disqualified from acting as a Councillor.

It was not disputed at the hearing, at which evidence was tendered on behalf of both applicants and respondent, that the latter was a shareholder of the Manawatu Welding and Engineering Co., Ltd., which was a company having fewer than twenty members.

It was made plain by counsel for the applicants that no *mala fides* was suggested, but he contended that the following events rendered Mr. Plimmer incapable of holding the office:

On October 28, 1947, he was nominated as a candidate. On November 18, 1947, the City Council by an order form of that date signed by the City Engineer ordered certain goods from the Manawatu Welding and Engineering Co., Ltd. On November 19, 1947, respondent was elected a member of the Palmerston North City Council. On November 26, 1947, he took office, not being aware of the order made upon the company. On December 31, 1947, an invoice was made by the company as against the City Treasurer, Palmerston North, for the goods referred to in the order form, charging £24 18s. On January

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[IN THE SUPREME COURT.]

In re LIST (DECEASED), *LIST v. PRIME AND OTHERS.*

SUPREME COURT. New Plymouth. 1948. August 25; October 27.
HUTCHISON, J.

Charities—Devise of Land to Public Hospital Board as Convalescent Home for Children—Disclaimer of Gift by Board—Gift a Valid Charitable Trust for “charitable purposes”—Disclaimer ineffective to cause Failure of Trust—Scheme directed to be prepared by Trustees—Religious, Charitable, and Educational Trusts Act, 1908, s. 14.

A devise of land to the trustees of the will upon trust for a Hospital Board as a convalescent home for children (or other like purposes to be determined by the Board) is a gift for a charitable purpose, and constitutes a valid charitable trust.

Income Tax Special Purposes Commissioners v. Pemsel(1) and *Public Trustee v. Wanganui Borough*(2) applied.

Gordon v. Commissioner of Stamp Duties(3) distinguished.

The gift showed a general charitable intention on the donor's part; and a disclaimer, under seal, by the Hospital Board was ineffective to destroy the trust, as it was not of the essence of the gift that the trustees selected by the testator should be the trustees of the gift, and the intention of the testator was to benefit children, and not to benefit the Hospital Board.

Reeve v. Attorney-General(4), *Re Lawton, Gartside v. Attorney-General*(5), and *In re Davis, Hannen v. Hillger*(6) applied.

In re Packe, Sanders v. Attorney-General(7) distinguished.

For the purposes of an application under Part III of the Religious, Charitable, and Educational Trusts Act, 1908, the promotion of any of the objects and purposes of a public hospital is a “charitable purpose,” within the limited range of charitable purposes indicated in the definition of that term in s. 14 of that statute.

Therefore, there being no failure of the trust, the Court directed, under Part III of the Religious, Charitable, and Educational Trusts Act, 1908, that a scheme for the disposition of the property comprised in the gift for submission to the Court should be prepared by the trustees, in consultation with the Hospital Board, and as approved by the Attorney-General.

(1) [1891] A.C. 531.

(2) [1918] N.Z.L.R. 646.

(3) [1946] N.Z.L.R. 625.

(4) (1843) 3 Hare 191; 67 E.R. 351.

(5) [1936] 3 All E.R. 378.

(6) [1902] 1 Ch. 876.

(7) [1918] 1 Ch. 437.

ORIGINATING SUMMONS for the interpretation of part of the will of Thomas Currie List, late of New Plymouth, newspaper proprietor, who died on August 17, 1934. By his will, he devised his residential property upon the following trusts:

3. I GIVE AND DEVISE my property known as “Maranui” being fifteen acres more or less and being part of Section thirty-five (35) Fitzroy District comprised in Certificate of Title Volume 25 Folio 69 to my trustees UPON TRUST to permit my wife to have the use and enjoyment thereof during her life she during that time keeping the buildings thereon in good repair and condition having regard to the age thereof for the time being and fully insured against fire in the names of and to the satisfaction of my trustees and keeping the gardens and other improvements in good order and condition AND after her death (a) UPON TRUST for the Taranaki Hospital Board as a convalescent home for children (or other like purposes to be determined by the said Board) provided however (b) THAT if at the time of my death or within six months thereafter the Corporation of the Borough of New Plymouth shall have acquired as a public recreation ground or park a portion of the land

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(known as "Brooklands") lying between "Maranui" and Pukekura Park of sufficient area to form an extension of the said Pukekura Park up to the boundary of "Maranui" then my trustees shall hold upon trust for the said Corporation that portion of "Maranui" comprising the gully of natural and artificial bush lying on the western side of the said property AND I DECLARE that my trustees shall have full and sole power to settle and decide the boundaries of the respective portions of the said property if any dispute or doubt should arise concerning the same and further that the cost of all surveys and plans necessary to enable the said portions to be transferred in accordance with the provisions hereof shall be borne and paid by the respective transferees (c) AND I FURTHER DECLARE that during the lifetime of my said wife my trustees shall have power with her written consent to lease the said property or any part thereof for such period and upon and subject to such terms and conditions as they may think fit.

The testator's wife survived him and was still living.

At the time of the testator's death, the "Maranui" property comprised an area of about 10½ acres, of which 2½ acres was occupied by the residence, outbuildings, and ornamental grounds, and the remaining 8 acres was an unoccupied paddock. The paddock was virtually unsaleable, and was of problematical value because of the difficulty and high cost of subdivision. The large residence and outbuildings were old and expensive to maintain. The Government valuation of the whole area was £3,010, and the gross rental value was less than the rates and expenses of upkeep of the buildings and ornamental grounds.

By deed of disclaimer dated July 21, 1936, the Taranaki Hospital

Board, under seal, disclaimed the gift set out in para. 3 (a) of the will.

On or about March 30, 1944, the portion of "Maranui" referred to in para. 3 (b) was vested in the Corporation of the Borough of New Plymouth, Mrs. List surrendering her life interest therein. On or about August 29, 1946, an area of rather over 8 acres, part of the "Maranui" property, was taken by the Crown under the provisions of the Public Works Act, 1928, for State housing purposes, and the trustees received, by way of compensation, the sum of £3,100. The "Maranui" property consisted, therefore, of the residence and outbuildings, which were about sixty years old, and an area of land of 2 acres, 2 roods, 10.65 perches. The property was valued at £2,500, and had been sold for that amount subject to the order of the Court in these proceedings. In addition, the trustees held, under the trusts of this paragraph of the will, investments representing £3,000.

The following were the questions submitted to the Court in the originating summons:

1. The Taranaki Hospital Board having disclaimed the gift and devise in its favour contained in para. 3 of the said will

(a) Whether the said gift and devise has failed by reason of such disclaimer: or

(b) Whether notwithstanding the disclaimer the gift still subsists and must be administered as a charitable gift *cy-près*.

2. If the answer to Question 1 (a) be in the affirmative

(a) Whether the subject-matter of the said gift and devise falls into the residue of the estate as given devised and bequeathed by para. 7 of the said will; or

(b) Whether the said subject-matter is to be administered upon an intestacy.

3. How the costs of this application are to be borne.

Sheat, for the plaintiff trustees.

R. H. Quilliam, for the Attorney-General.

Cur. adv. vult.

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HUTCHISON, J. Mr. Quilliam, for the Attorney-General, submitted on the first question :

(a) The gift in favour of the Taranaki Hospital Board constituted a valid charitable trust.

(b) It showed a general charitable intent, and the disclaimer by the Hospital Board was ineffective to cause a failure of the trust. 5

(c) There being no failure of the trust, the Court would substitute *cy-près* another mode of giving effect to the trust.

Mr. Croker, for the defendants, being those entitled under the residuary clause of the will of the testator, while making it clear to the Court that his clients had no personal wish to oppose the gift made by the testator, properly opposed the submissions on the part of the Attorney-General, in particular, the second one. 10

On the question whether the gift is a good charitable bequest, I entertain no doubt. Counsel has not found any case concerning a gift to a Hospital Board in New Zealand. There are many authorities that show that a hospital is within Lord Macnaghten's well-known classification of charities in *Income Tax Special Purposes Commissioners v. Pemsel*(1). 15

In *Gordon v. Commissioner of Stamp Duties*(2), a property belonging to the testatrix was at the time of her death being used by a tenant as a private maternity nursing-home. By her will, the testatrix gave this property to her trustees : 20

upon trust to carry on the same as a maternity nursing hospital in such manner as they may think fit and to fix and determine the rules terms and conditions which shall control and direct the management and use of such hospital including the charges to be from time to time made in connection therewith and also the manner in which such hospital shall be conducted with power also for them to establish and appoint such committee of management or control as my trustees shall think fit and to make such provision for the permanent management of the said hospital as they may deem expedient Provided nevertheless that such hospital shall not be attached to any public hospital nor shall it be placed under the control of any Hospital Board. 25 30

Other relevant provisions of the will are set out in the report. The question was whether this devise, and the residuary bequest associated with it, as set out in the report, were charitable gifts. Kennedy, J., considered a number of the cases. He said : " What, then, is the general character of the testatrix's purpose as appearing in the will? The property is not given to an institution or body which has charitable purposes but to trustees named for the present purposes. The trust therefore must be found in the mandate contained in the will. One can only infer it from what the will provides. There is no indication therein that thereby the testatrix is carrying out a purpose of maternal welfare or any such thing. One may say so but the warnings against assumption without material terms to warrant it must be remembered. In *Hunter v. Attorney-General and Hood* ([1899] A.C. 309), Lord Davey said : ' You must construe the words of the will fairly, and if you find a charitable purpose sufficiently clearly expressed the Court will give effect to it. If you do not find any such definite expression, you are not at liberty to supply it from more or less well-founded speculation of what the testator would probably have wished or intended if his attention had been drawn to the omission. It may be that *'voluit sed non dixit'* (*Ibid.*, 321). The property and funds are given to the trustees to carry on a maternity nursing hospital. Obviously a maternity hospital may, in certain circumstances, be so carried on 35 40 45 50

(1) [1891] A.C. 531, 583.

(2) [1946] N.Z.L.R. 625.

"and for such purposes as to be a charity. It will come under the heading
 "of gifts of a public nature directed towards the relief of people in distress,
 "but it must be of a public nature. Equally obviously, as in the case of
 "many private hospitals, it may not be a charity. The trustees are given
 5 "complete discretion as to how it shall be carried on and as to what its
 "use shall be. This discretion is of the widest. There is a total absence
 "of any limits or restrictions placed on the trustees. The only restriction
 "is that the funds or profits derived from the carrying on of the business
 "shall be used in a particular way which is generally for the promotion
 10 "of the business and the improvement of the hospital and that the nursing
 "hospital shall not be attached to any public hospital or placed under the
 "control of any Hospital Board. It was said that the poor were not
 "excluded, but the power is so wide that the trustees might exclude
 "them and confine the hospital to the rich, or they might exclude the public
 15 "generally and confine its use to selected individuals. There is no res-
 "triction as to fees or charges. The trustees might receive and treat
 "only selected individuals. It was said that this was a trust for the
 "benefit of a section of the community of Gore and surrounding districts,
 "but there is nothing in the will requiring that. The trustees may or
 20 "may not carry on in such a way. They are not, by anything in the will,
 "so required. They may exclude residents in the district, and there
 "would be no means of compelling the trustees to receive them. While
 "the trustees are to carry on the business there is no provision expressly
 "or by implication requiring that the maternity nursing hospital shall
 25 "not be carried on upon a purely commercial basis. The testatrix refers
 "to the business. The trustees have power to lease. A lease might be
 "granted for a long term to Mrs. Wallace to be for such period as the
 "trustees, in their discretion, think fit so that during that period the
 "trustees are merely property owners with revenue coming in
 30 "from the leasing of the property. The maternity hospital might
 "be carried on, then, in no different way from what is termed a
 "private hospital and for no different purpose, except that the profits,
 "when earned, are to be used for the better equipment of the hospital
 "and the development of the business and that any funds not required
 35 "for these purposes will be accumulated and invested until required.
 "It cannot be denied that, if by assumption the testatrix's purpose was
 "simply to carry on the hospital as a commercial proposition indefinitely
 "for the money to be obtained thereby, the language of the will is appro-
 "priate to allow that. There is no requirement that the maternity
 40 "nursing hospital is to be carried on for the benefit of the *public* or for a
 "class of the *public* in such a way that it can be said it is for purposes
 "so general and public as to constitute a charitable trust. There is in
 "the will, then, an absence of definition of the purposes for which the
 "nursing hospital is being carried on, and an absence of indication of
 45 "those to benefit by the carrying-on, and, in particular, an absence of
 "anything to show that it must be carried on in some way for the benefit
 "of a class of the community or of any particular class of the community
 "sufficiently large to be treated as constituting a public use. Many
 "of the hospital cases are to be distinguished on the ground that, first,
 50 "there was an existing institution whose purposes were charitable;
 "and, secondly, that, where the purpose was not defined in the character
 "of the trustee and otherwise, there was such sufficient indication of
 "the class of the public to be benefited and of the mode of benefit as to
 "show the use was a public general and charitable one" (3). His
 55 Honour therefore held that the dispositions of the will were not charitable.

(3) *Ibid.*, 633, 634.

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The case of a public hospital under the Hospitals and Charitable Institutions Act, 1926, is entirely different from the case of the nursing hospital in *Gordon's* case(4). The gift here is given to the Taranaki Hospital Board by name. A public hospital accepts as patients all persons, whether or not they can afford to pay any fees. Its doors are closed to no one. At the time of the testator's death, the income of the Board was derived in part from fees payable by such patients as could afford to pay them. As to the balance, it was derived from a subsidy from the Consolidated Fund and by payments of contributions by the local authorities within the Board's district. Since the passing of the Social Security Act, 1938, fees are payable, speaking generally, out of the Social Security Fund, instead of by the patients themselves. In either event, a public hospital is not carried on on a commercial basis, but its financial endowment indicates a charity. For the purposes of an application under Part III of the Religious, Charitable, and Educational Trusts Act, 1908, the promotion of any of the objects and purposes of a public hospital is a charitable purpose, within the limited range of charitable purposes indicated in the original definition in s. 14 of that Act.

The trust is for a convalescent home for children. Even without the appointment of the Taranaki Hospital Board as trustee of this particular trust, this purpose would, in my view, bring the devise within the definition of a charity. *Sir Robert Stout, C.J.*, in *Public Trustee v. Wanganui Borough*(5), in dealing with a gift to the Mayor and Councillors of the then Borough of Wanganui, said: "Taking the third question first, there was 'no contention that a bequest of property for the saving and well-being of children in early years, under five years of age, is not a charitable object within the meaning of our law. The property is to be for a residence for nurses devoted to this object, known as 'Plunket Nurses,' and for as many children under five years of age as may be conveniently accommodated. Gifts to institutions for lost dogs, animals' hospitals, &c., have been held to be charitable, and the preservation of children is of more importance than the preservation of animals. In the case of *Income-tax Commissioners v. Pemsel* ([1891] A.C. 531, 572) *Lord Herschell* said: 'I think, then, that the popular conception of a charitable purpose covers the relief of any form of necessity, destitution, or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief.' The third question must therefore be answered in the affirmative"(6).

The gift, in my view, constitutes a valid charitable trust.

The reasons for the renunciation of the trust by the Taranaki Hospital Board, which took no legal advice at the time as to its position, though it made full inquiries of such persons as were, on the practical question, competent to advise it, and acted with the approval of the Health Department, are explained in his affidavit by the Chairman of the Board (who has been Chairman ever since before the date of the renunciation). Whether these reasons may be given any weight, in view of the solemn execution of the disclaimer, under seal, by the Hospital Board, need not be considered if the gift shows a general charitable intention on the part of the donor. It is set out in *Tudor on Charities*, 5th Ed. 151, 152:

The *cy-près* principle applies where an institution declines a gift provided the Court does not consider the whole intention to have been thereby frustrated.

And in *4 Halsbury's Laws of England*, 2nd Ed. 196, para. 274, it is stated:

Nor does the disclaimer of the trustee invalidate the gift except where the gift is to a charitable institution for its general purposes, or for a foreign charity over which the Court has no jurisdiction.

(4) [1946] N.Z.L.R. 625.

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(6) *Ibid.*, 642.

In *Reeve v. Attorney-General*(7), Sir James Wigram, V.-C., said :
 " The suggestion on behalf of the Attorney-General is that, inasmuch as
 " the trustees appointed by the testator have refused to act, the Court
 " has no means of carrying the particular trusts into execution ; for it
 5 " is said that the societies which the testator selected as the instruments
 " for distributing these charitable funds, were not in the situation of
 " ordinary trustees ; that their places could not, like those of ordinary
 " trustees, be supplied by others ; that it must be assumed the testator
 " appointed these particular societies, because he considered them, owing
 10 " to the objects for which they exist, as peculiarly conversant with the
 " facts necessary to render the exercise of their discretion in the disposal
 " of the fund more valuable than that of any other persons, and that
 " therefore the discretion of the trustee is of the essence of the trust ;
 " on the other hand, it is said that the disclaimers of the trustees do not
 15 " affect the trust, and that it is sufficiently defined to enable the Court to
 " execute it "(8). And again : " In this case the objects of the trust are
 " pointed out by the will with great minuteness. I have no ground,
 " either in the language of the will or the circumstances of the case,
 " for supposing that the discretion of the particular societies named in
 20 " the will was of the essence of the gifts, so that the disclaimers of those
 " societies is to destroy the gifts altogether. I think that is not the
 " case "(9).

In *Re Lawton, Gartside v. Attorney-General*(10), Bennett, J., said :
 " The gift that has to be considered in this case is ' to the trustees for the
 25 " time being of the Methodist (formerly Wesleyan Methodist) Chapel,
 " situate at Greenfield in the county of York,' of ' the sum of £1,000 or
 " one half of the net amount when ascertained as above,' i.e., after pay-
 " ment of the testatrix's debts and funeral and testamentary expenses
 " and conversion of investments and other properties into money '(which-
 30 " ever is the lesser amount)' with the direction : ' that the said trustees
 " shall apply the same or such part thereof as is necessary for the purchase
 " of a field or other plot of land which they shall permit to be used by
 " the children attending the Methodist Sunday School in connection
 " with the said Greenfield Chapel and such other children of the vicinity
 35 " (of day-school age only) as the trustees approve as and for a recreation
 " ground or playing field.' The trustees of the Methodist Chapel at
 " Greenfield have disclaimed and renounced all right, interest and title
 " to the legacy owing to the nature thereof. Upon that fact the question
 " arises, and is asked by the summons, whether the bequest failed and
 40 " falls into the residuary estate of the testatrix. The gift is a charitable
 " gift. That is conceded, and it is settled that the disclaimer by the trustees
 " of a charitable gift is immaterial unless it is of the essence of the gift
 " that the trustees selected by the testatrix should be the trustees of her
 " gift. I can see nothing, either in the facts or in the terms of this gift,
 45 " which affords any foundation whatever for the suggestion that it was
 " of the essence of this gift that the trustees of this chapel should be the
 " trustees of the charity, and accordingly I decide that the bequest has
 " not lapsed and that the legacy does not fall into the testatrix's residuary
 " estate "(11).

50 In *re Packe, Sanders v. Attorney-General*(12), cited by counsel for the
 defendants, is a case in which the testatrix gave to the Poor Clergy Relief
 Corporation a cottage and sum of money upon a charitable trust. The

(7) (1843) 3 Hare 191 ; 67 E.R. 351.

(8) *Ibid.*, 196 ; 353, 354.

(9) *Ibid.*, 197, 198 ; 354.

(10) [1936] 3 All E.R. 378.

(11) *Ibid.*, 380.

(12) [1918] 1 Ch. 437.

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Corporation declined the gift. The particular charitable purpose for which the bequest was made was impracticable, the income provided for the purpose of carrying on the home being inadequate. *Neville, J.*, said: "I have therefore to consider whether, notwithstanding that failure of the testatrix's intention as expressed with regard to the house mentioned in her will, there is such a general charitable intention as to make it right that the Court should direct a scheme to be prepared by which the property can be realized and the funds distributed for some charitable purpose. I cannot put the question I have to decide better than it is put by *Parker, J.*, in the case of *In re Wilson* ([1913] 1 Ch. 314, 320), where he says: 'First of all, we have a class of cases where, in form, the gift is given for a particular charitable purpose, but it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect . . . Then there is the second class of cases, where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift,—a gift for a particular purpose—and it being impossible to carry out that particular purpose, the whole gift is held to fail.' I can only say that, after studying this will with care, I cannot find on the part of the testatrix any hint of any general charitable intention. So far as anything is disclosed by the will, one cannot say whether she had any intention of any sort beyond the intention that the particular charitable purpose which she expressed should be carried into effect. It seems to me, therefore, to be playing with words in the case of a will of this kind to pretend to find a general charitable intention paramount to the particular directions given with regard to 'the house' (13).

I think that I must decide this question by application of the test stated by *Bennett, J.*, in *Re Lawton, Gartside v. Attorney-General* (14)—namely, by asking the question: Is it of the essence of the gift that the trustee selected by the testator should be the trustee of his gift? The gift is for a special purpose, and not for the general purposes of the Hospital Board, though the Hospital Board was an obvious person to carry out most satisfactorily the purpose desired by the testator. The testator's wish was to provide the gift for the benefit of children, and not for the benefit of the Hospital Board—"to give to a purpose and not to a person": *In re Davis, Hannen v. Hillyer* (15).

The will, in para. 3 (b), makes a gift to the Corporation of the Borough of New Plymouth for the purposes of public gardens, and, in para. 6 (a), a gift to the St. Mary's Parochial Trust Board for the purposes of a chapel. These are matters that are of importance in coming to a conclusion as to whether a general charitable intention is shown: *In re Davis, Hannen v. Hillyer*. In *In re Packe, Sanders v. Attorney-General* (16), there was no such indication. A limited discretion is given to the Hospital Board by the gift, but a limited discretion was given, too, to the trustees of the Methodist Chapel in *Re Lawton, Gartside v. Attorney-General* (17), and *Bennett, J.*, did not consider that sufficient to indicate that it was of the

(13) [1918] 1 Ch. 437, 441, 442.

(16) [1918] 1 Ch. 437.

(14) [1936] 3 All E.R. 378, 380.

(17) [1936] 3 All E.R. 378.

(15) [1902] 1 Ch. 876, 882.

essence of the gift that the trustees of the Chapel should be the trustees of the charity (18).

It was submitted that the gift in para. 6 (a) was by way of a memorial to the only son of the testator, who died while a pupil at the New Plymouth Boys' High School. I am not sure that I can accept extrinsic evidence, but, if I were to, this piece of evidence is more than outweighed by another piece of extrinsic evidence I was given, that the testator was very fond of children and was one of the founders of the Crippled Children's Society.

10 For the reasons given, I think that a general charitable intention is shown, and I accordingly hold that the disclaimer by the Taranaki Hospital Board was ineffective to destroy the trust set out in para. 3 (a) of the will. My answers to the questions submitted are :

Question 1 : (a) No.—(b) Yes.

15 Question 2 : No answer required.

A scheme, therefore, should be prepared, as all counsel agreed if my view should be as now stated, by the trustees, for submission to the Court, the scheme to be approved by the Attorney-General. I agree that it would be proper that the Taranaki Hospital Board be consulted 20 too.

I think the costs of all parties should come out of the fund. The Attorney-General and the defendants will each be allowed twenty-five guineas, with disbursements. These costs, and the trustees' costs as between solicitor and client, to be taxed by the Registrar, will be paid out 25 of the fund.

Questions answered accordingly.

Solicitors for the Attorney-General: *Govett, Quilliam, Hutchen, and Macallan* (New Plymouth).

Solicitors for the plaintiff trustees: *Nicholson, Kirkby, and Sheat* (New Plymouth).

Solicitors for the defendants, the testator's two children: *Crocker, McCormick, and Greiner* (New Plymouth).

(18) *Ibid.*, 380.

[IN THE MAGISTRATES' COURT.]

HALL v. HARVEY.

1948. October 18, 22, before Mr. J. H. LUXFORD, S.M., at Auckland.

Road Traffic—School Patrol Controlled Crossing—Obligation to yield Right of Way over Length of Crossing—Passage over Crossing ahead of or behind Pedestrians—No Interference with their Right of Precedence—Vehicle entitled to proceed without Stopping—"Right of way"—Traffic (Road-crossing) Regulations, 1944 (Serial No. 1944/181), Reg. 42.

Regulation 42 of the Traffic (Road-crossing) Regulations, 1944—
which is as follows :

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"Every driver of a vehicle (including a horse-drawn vehicle
"and including the rider of a bicycle) when a patrol sign is extended
"at a crossing shall stop and thereby yield the right of way to
"school-children and other persons using or about to use the
"crossing, irrespective of what part of the crossing the persons are
"on at the time."

extends the pedestrian's protected area to a "school patrol controlled
"pedestrian-crossing," so that the obligation to yield the right of way
to pedestrians extends to the whole length of the crossing.

Therefore, the driver of a vehicle and the rider of a bicycle must
stop when the school patrol sign is extended, if such be necessary
to yield the right of way to pedestrians using or about to use the
crossing. If the vehicle can pass over the crossing either ahead
of or behind the pedestrians, without in any way interfering with their
right of precedence to continue on their course, it is entitled to proceed
without stopping.

INFORMATION alleging that the defendant committed a breach of
Reg. 42 of the Traffic (Road-crossing) Regulations, 1944 (Serial No.
1944/181), in that he failed to stop his motor-car and thereby yield the
right of way to school-children using or about to use an authorized
pedestrian-crossing when a school patrol sign was extended at the
crossing.

The defendant was driving his motor-car in a southerly direction
along Victoria Street, Devonport, and was approaching a pedestrian-
crossing. The controlling authority had duly authorized the appoint-
ment of "school patrols" for this crossing. At the time the defendant
approached the crossing, it was being controlled by a school patrol.
The authorized patrol sign was extended by both members of the patrol,
who were stationed at each end of the crossing respectively, and several
children and adults were crossing from west to east, but had passed the
centre line of the road and were close to the eastern end of the crossing.
The defendant did not stop his motor-car, but turned it to the right, and
so enabled it to pass behind the pedestrians. There is no sugges-
tion that the defendant was travelling at an excessive or unreason-
able rate of speed, or that the safety of any of the pedestrians was in any
way endangered.

Horrocks, for the defendant.

Cur. adv. vult.

LUXFORD, S.M. The information in this case is laid under Reg. 42
which is as follows :

"Every driver of a vehicle (including a horse-drawn vehicle
"and including the rider of a bicycle) when a patrol sign is extended at a
"crossing shall stop and thereby yield the right of way to school-
"children and other persons using or about to use the crossing,
"irrespective of what part of the crossing the persons are on at the
"time."

This regulation, like so many of the regulations, is difficult to under-
stand, without a great deal of study and consideration. It starts off by
requiring every driver to stop his vehicle when the patrol sign is extended,

and does not limit the requirement to those drivers whose vehicles are approaching the intersection. That limitation may, however, be inferred from the words "shall stop and thereby yield the right of way." The expression "right of way" is defined by the Traffic Regulations, 1936, to mean "the right of precedence in continuing on a course." The obligation to stop, therefore, only arises when such is necessary to enable persons using or about to use the crossing to exercise their right of precedence in continuing on their course.

The words at the end of the regulation—namely, "irrespective of what part of the crossing the persons are on at the time"—are difficult to reconcile with an obligation which merely requires a driver to yield the right of way. At first glance, it would seem that the words indicate that, whenever a person is walking on a pedestrian-crossing when the patrol sign is extended, all vehicles must stop, and remain stopped, until the crossing is clear of pedestrians. On further consideration, however, I have come to the conclusion that the words have been inserted solely for the purpose of extending what may be called the pedestrian's protected area. At an ordinary pedestrian-crossing, the protected area is limited by Reg. 14 (7) of the Traffic Regulations, 1936, to "the half of the road-way over which such vehicle is lawfully entitled to travel," but at a "school patrol controlled pedestrian-crossing" the obligation to yield the right of way to pedestrians extends to the whole length of the crossing: Traffic (Road-crossing) Regulations, 1944, Reg. 42.

The essence of the regulation (as at present framed) is that the driver of a vehicle and the rider of a bicycle must stop when the patrol sign is extended, if such be necessary in order to yield the right of way to pedestrians using or about to use the crossing. If the vehicle can pass over the crossing either ahead of or behind the pedestrians, without in any way interfering with their right of precedence to continue on their course, it is entitled to proceed without stopping.

I regret that I am impelled so to construe Reg. 42, because I regard the scheme of school patrols as one of the most important of our road-safety measures, both from the point of view of preserving life and limb, and from that of educating the younger generation in road discipline.

The stop sign, when lawfully displayed by a school patrol, should mean exactly what it says, and without any reservations. Unless it does, the splendid results which the scheme should produce will not be obtained.

In the present case, the defendant drove over the crossing well behind the pedestrians, and did not, by so doing, interfere with their right of way. The evidence does not show that any other persons were using or were about to use the crossing at the time, and, consequently, the information must be dismissed.

Information dismissed.

Solicitors for the defendant: *Holmden and Horrocks* (Auckland).

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WILLIAMSON v. ROWAN.

1948. September 23, October 21, November 10, before Mr. J. H. LUXFORD, S.M., at Auckland.

By-law—Municipal Corporation—Breaking in or Training Horses in Borough Streets—"Break in"—"Train"—Exercising Racehorses at Walking Pace not Breach of By-law.

The defendant was charged with training certain racehorses in certain streets in the Borough of Ellerslie contrary to the following by-law :

"No person shall break in, train, clean, shoe, bleed, dress, or expose for show, hire, or sale any horse or other animal in any street or private street or by locking the wheels of any cart or other vehicle, or otherwise, test or try any animal in any such street or private street."

The expression "breaking in," as used in the by-law, is used in the limited sense of reducing a horse from an unmanageable state to a manageable state.

The riding of racehorses at a walking pace along the streets for exercise does not constitute "training" within the meaning of the by-law, as the word, as therein used, relates solely to teaching or schooling a horse to do some particular act or thing.

It was unnecessary for the learned Magistrate to decide whether the portion of the by-law under which the defendant was charged was void on the ground of unreasonableness, as the evidence did not establish that the defendant's horses were being ridden along the Borough streets at any material time as part of their training.

Semble, Taking a horse, after it has been fully broken in, along a road for the purpose of its becoming accustomed to traffic does not constitute a breach of the by-law.

INFORMATION alleging that the defendant did on divers occasions between June 18, 1948, and August 1, 1948, train certain racehorses in certain streets in the Borough of Ellerslie—namely, Umere Crescent and Ladies Mile—contrary to s. 112 of By-law No. 1 of the Ellerslie Borough By-laws. The by-law is as follows :

"No person shall break in, train, clean, shoe, bleed, dress, or expose for show, hire, or sale any horse or other animal in any street or private street or by locking the wheels of any cart or other vehicle, or otherwise, test or try any animal in any such street or private street."

The defendant was one of the many horse-trainers having establishments either in or near the Borough of Ellerslie. It was stated in the evidence that there were over forty of these establishments, in which about a hundred and seventy-five horses were kept.

The defendant's stable was in Umere Crescent in the Borough, and was near to the well-known Ellerslie Racecourse. During the period mentioned in the information, he had six horses under his care; three were yearlings, two were two-year-olds, and one was a three-year-old.

On a number of occasions during the material period, the horses were exercised in Umere Crescent and in Ladies Mile. Two horses would be ridden at a walking pace on a circuit round Umere Crescent and to Ladies Mile for periods of an hour or more. A number of residents in Umere Crescent complained to the Council about this practice on two grounds: first, that their children were frightened at the horses, and would run inside when they came along, and, secondly, that the horses' hoofs damaged the grass verge at the side of the roadway.

Steadman, for the informant.

Kingston, for the defendant.

Cur. adv. vult.

LUXFORD, S.M. [After stating the facts, as above:] Evidence was also called to show that horses were driven along the road for "mouthing practice." The defendant admits that, after the yearlings have been mouthed at the stables, they are taken on the road for the purpose of becoming accustomed to traffic. In order to do this, long reins are attached to a bridle, and a man holds the reins at a distance of about 8 ft. or 9 ft. behind the horse. This is apparently the recognized method of "breaking in" horses to traffic, and, according to the uncontradicted evidence of the defendant, is the safest method.

The defendant, however, further deposed that none of the yearlings was taken on the road for the purposes of being "broken in" to traffic after June 14, 1948, which, of course, is prior to the period alleged in the information. As I accept his evidence as true, it is not necessary for me to decide whether or not the act of driving a horse on a public road in order to "break it in" to traffic constitutes a breach of the by-law.

Mr. *Steadman* contended that the expression "break in," when used with respect to a horse, is synonymous with "train," and cited the definition of the expression given in *1 Oxford English Dictionary*, Pt. II, p. 1071—namely, "to reduce to obedience or discipline, tame, train."

In New Zealand, the expression "break in," when used with respect to a horse, has acquired a distinctive meaning. When we speak merely of "breaking in" a horse, we refer to horses which have not been handled, and have run loose on land from the time of their birth. The "breaking in" of those horses may be said to be a process of taming them and of reducing them to obedience. When this has been done, a further process is necessary, in order that the horse may be ridden or driven. This process is called "breaking in" a horse for the saddle or for harness. The expression, in this sense, is synonymous with "training." Consequently, either of these processes would come within the by-law. When, however, a horse has been broken in to the stage that it may be ridden or driven, it still has to be made accustomed to traffic on the road. Again, we speak of "breaking in" a horse to road traffic, but the by-law was never meant to apply to that form of "breaking in," otherwise a horse

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would seldom, if ever, be able lawfully to make its first appearance on the road in the Borough of Ellerslie, or in any other local authority district where a similar by-law is in operation. In my opinion, therefore, the words "breaking in" are used in the by-law in a limited sense—namely, reducing a horse from an unmanageable state to a manageable state. In the present case, the yearlings in question had been handled from birth, and were always manageable. They had been "mouthed" to bit and rein, and all that the defendant did was to take them on a road to accustom them to traffic. The yearlings were under proper control. Consequently, if it had been necessary for me to decide the question, I would have held that taking a horse (after it has been fully broken in) along a road for the purpose of its becoming accustomed to traffic does not constitute a breach of the by-law.

The informant further contends that riding racehorses at a walking pace along the streets for exercise constitutes "training," and so is an offence under the by-law. The evidence shows that the two-year-olds and the three-year-olds were, during the period referred to in the information, being trained by the defendant, in the sense that they were either being prepared for racing or kept ready for racing, and that walking exercises form part of the training programme. On the other hand, walking exercise is essential for stabled horses. The defendant stated in evidence that the main training of his horses is done on the Ellerslie Racecourse, but the course is not open on Saturdays and Sundays. Consequently, it is imperative, for humane reasons alone, that the horses be exercised; and the only practicable way of exercising them is to ride them at a walk along the road.

I am satisfied from the evidence that, when the horses are ridden along the road, they are for all practicable purposes no different from any other two horses being ridden along the road, except that the defendant's stable-hands are more expert than an ordinary rider, and, by reason of the high value of their mounts, they exercise more care than would be exercised by an ordinary rider.

The by-law enacts that no person shall train any horse in any street. *10 Oxford English Dictionary*, Pt. I, 238, defines the verb "train" to mean, in respect of an animal:

"To discipline and instruct (an animal) so as to make it obedient to orders, or capable of performing tricks; to prepare a racehorse for its work."

Mr. Kingston, in the course of his argument, stated that, for any one who is at all familiar with racing parlance, it is commonly known that a horse is either "in training" or "out of training"—that is to say, there are periods during which every racehorse is thrown out of training, meaning by such an expression that the horse is not being actively worked or indulged in violent exercise for the purpose of training such horse for racing purposes. At a later date, the horse may be brought into training again, and the more violent type of exercise which is inseparable from horse training then recommences, starting with what is known as trotting exercises, half-pace work, three-quarter-pace work, and then full training gallops. I agree with this statement, so far as it goes, but, according to the evidence of Mr. Gilchrist, walking exercises form an important part of the training.

If a person were stupid enough to use any public street in the Borough of Ellerslie for the more violent type of exercise which is inseparable from racehorse training, it would not be necessary to invoke the by-law to abate the nuisance, as there are more appropriate and effective provisions contained in the Police Offences Act. However, I have no doubt that the Council is entitled to frame a by-law prohibiting the use of the streets within its jurisdiction for such purposes. But to enact a by-law which makes it unlawful for a person to ride a racehorse at a walking pace along any public street in the Borough just because the horse is being exercised to keep him fit or to make him more fit for racing is unduly restrictive of the rights of user enjoyed by every member of the public in respect of the King's highway.

There are, however, two reasons why it is unnecessary for me to decide whether the portion of the by-law under which the defendant is charged is void on the ground that in its present form it is unduly restrictive, and, therefore, unreasonable.

First, although walking exercise may be part of the preparation of a racehorse for its work, it does not, in my opinion, constitute "training" within the meaning of the by-law. The word "train," in my opinion, relates solely to teaching or schooling a horse to do some particular act or thing. Thus, it would be an offence under the by-law if a person on a street were to teach a horse to jump, or to make quick turns, or to back, or to perform a trick. But the word could not reasonably have been intended to include riding a horse at a walking pace for the purpose of exercising it, even if the exercise forms part of the horse's preparation for racing. The absurdity of the informant's contention can be seen in the case of a horse being ridden from the stable to course and back again after a gallop on the course.

Secondly, I am not satisfied that the evidence establishes that the horses were being ridden at any material time as part of their preparation for racing merely by way of exercise. The period covered by the information comprised the winter months. The defendant stated in evidence that it is essential that stable horses should be taken out for exercise, especially on cold or wet days when the Ellerslie Racecourse is not available. He went so far as to say that he regards taking the horses for a walk as being as important as watering and feeding them. The evidence shows that the racecourse cannot be used by trainers at week-ends, and, consequently, the only way the horses could get exercise was to walk them along the road.

For these reasons, I must hold that a breach of the by-law has not been committed, and dismiss the information accordingly. The informant must pay the defendant's costs, which I fix at £5 5s. plus witnesses' expenses.

Information dismissed.

Solicitor for the informant: *H. A. Steadman* (Auckland).

Solicitors for the defendant: *Lisle Alderton and Kingston* (Auckland).

HUNTER v. W. LOVETT, LIMITED.

1948. October 11, 22, before Mr. J. H. LUXFORD, S.M., at Auckland.

Transport Licensing—Gross Weight of Vehicle exceeding Maximum Gross Weight in Certificate of Fitness—Charge of permitting Use of Vehicle exceeding such Weight—No Offence—Transport Licensing (Goods-service) Regulations, 1936 (Serial Nos. 1936/49, 1940/36), Regs. 10 (1), 16 (3).

There is nothing in the Transport Licensing Act, 1931, or in any order or regulation making it a specific offence to use a vehicle when its gross weight exceeds the amount specified in the certificate of fitness.

Consequently, where the gross weight of a motor-vehicle is in excess of the gross weight permitted by the certificate of fitness, there is no breach of Regs. 10 and 16 (3) of the Transport Licensing (Goods-service) Regulations, 1936.

Quære, Whether a charge may lie under cl. 24 of the Transport (Goods) Order, 1936, for using the vehicle in connection with a goods-service, as the certificate of fitness may be valid, as such, only while the gross weight does not exceed the amount specified in the certificate.

INFORMATION charging the defendant with a breach of Reg. 10 (1) of the Transport Licensing (Goods-service) Regulations, 1936 (Serial Nos. 1936/49, 1940/36).

The charge contained in the information was described as follows:

“being the holder of a goods-service license did permit a motor-vehicle to be used under such license when the vehicle with its load
“exceeded the maximum gross weight set out for that vehicle in the
“respective certificate of fitness contrary to Reg. 10 (1) and Reg. 16 (3)
“of the Transport Licensing (Goods-service) Regulations, 1936.
“as amended by Reg. 4 of the Transport Licensing (Goods-service) Regulations, 1936, Amendment No. 3.”

The defendant was the holder of a goods-service license, and on June 21, 1948, used a vehicle in connection with the licensed goods-service. A certificate of fitness in the prescribed form had been issued in respect of this vehicle. The certificate contained the following stipulation:

“I hereby authorize the above-mentioned vehicle to be used for
“the carriage of . . . 13,979 lb. of goods being in all a gross
“weight of not more than 22,750 lb.”

On the day in question, the vehicle was stopped by the informant, and weighed by him. Its gross weight was then found to be in excess of the gross weight permitted by the certificate of fitness.

Kingston, for the defendant.

Cur. adv. vult.

LUXFORD, S.M. Mr. *Kingston* did not challenge the correctness of the weight deposed to by the informant, but contended that the information does not disclose any offence.

The relevant provisions are as follows :

(a) Clause 13 (3) of the Transport (Goods) Order, 1936, which provides that :

"It shall be a condition of every goods-service license
"that every vehicle to be used in connection with the license shall be
"maintained in a fit and proper condition, to the satisfaction of the
"Commissioner of Transport, and that the requirements of any regulations made for this purpose are duly fulfilled."

(b) Clause 24, which prohibits the use of a vehicle in connection with a goods-service license unless a certificate of fitness has been issued and is in force with respect to such vehicle. A penalty is imposed for using a vehicle contrary to the provisions of this clause.

(c) Regulation 10 (1) (as amended) of the Transport Licensing (Goods-service) Regulations, 1936, which requires every certificate of fitness to be in the prescribed form.

(d) The Schedule of the Transport Licensing (Goods-service) Regulations, 1936, which sets out the form of the certificate of fitness.

There is nothing in the Transport Licensing Act, 1931, or in any Order or regulation making it a specific offence to use a vehicle when its gross weight exceeds the amount specified in the certificate of fitness.

It may well be that, as the Commissioner of Transport is required to specify in the certificate of fitness the gross maximum weight at which a vehicle may be used in connection with a goods-service, the certificate is valid as such only while the gross weight does not exceed that amount. If that is so, then a charge may lie under cl. 24 of the Transport (Goods) Order, 1936. The defendant, however, has not been charged with using the vehicle contrary to the provisions of cl. 24, and so has not had an opportunity of answering such a charge. I propose, therefore, to dismiss the information, on the ground that it does not disclose any offence.

Information dismissed.

Solicitors for the defendant : *Holmden and Horrocks* (Auckland).

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BAIGENT v. STONE.

1948. October 11, 22, before Mr. J. H. LUXFORD, S.M., at Auckland.

Road Traffic—Right-hand Rule—Compulsory-stop Sign on Road close to Intersection—Intersection a “controlled intersection”—Right-hand Rule not Applicable thereto—“Uncontrolled intersection”—Traffic Regulations, 1936 (Serial Nos. 1936/86, 1943/199), Reg. 14 (6).

Where the driver of a motor-vehicle is travelling along a road on which, close to the intersection of that road with another, there is a compulsory-stop sign, that intersection must be deemed a “controlled intersection” for the purposes of Reg. 14 (6) of the Traffic Regulations, 1936, and that regulation accordingly has no application to such an intersection.

INFORMATION charging the defendant with a breach of the right-hand rule. The breach was alleged to have occurred in the cross-intersection formed by Park Road and Mountain Road joining Khyber Pass Road on its northern and southern sides respectively. The defendant was proceeding along Mountain Road with the intention of crossing Khyber Pass Road and continuing along Park Road. Another car, driven by Mr. Meyer, was proceeding east to west along Khyber Pass Road as the defendant's car entered the intersection: that meant that Meyer's car was on the defendant's right-hand side. When Meyer saw the defendant's car, he turned his car to the right, in such a way that it appeared that he was turning into Park Road.

Horrocks, for the defendant.

Cur. adv. vult.

LUXFORD, S.M. I am satisfied that Meyer turned his car to the right in order, as he thought, to avoid a collision with the defendant's car. The defendant had seen Meyer's car, and thought that she had ample time to cross ahead of it.

I am unable to find as a fact that the defendant was justified in assuming that her car could safely cross the intersection ahead of Meyer's car. It was night-time, and it was difficult to judge the exact distance between Meyer's car and the intersection. It may well be that, if Meyer had not turned his car to the right, but had allowed it to continue on its course, it would have passed safely behind the defendant's car. That, however, is not the test. Meyer's car was close to the intersection, and so was approaching the intersection within the meaning of cl. 6 of Reg. 14 of the Traffic Regulations, 1936. If, therefore, the right-hand rule applies to this intersection, there was an obligation on the defendant to allow Meyer's car to pass before her.

Mr. *Horrocks*, however, contends that, as a compulsory-stop sign has been erected in Mountain Road, and another in Park Road, at points just short of their joining Khyber Pass Road, the right-hand rule has no application to the intersection.

This contention is well founded. Clause 6 of Reg. 14 clearly states that the right-hand rule applies to “uncontrolled intersections,” and defines an uncontrolled intersection as:

"any intersection the traffic at which is not for the time being controlled by a police officer, traffic inspector, traffic-control lights, or the presence of a compulsory-stop sign."

The evidence shows that the defendant was travelling along Mountain Road towards Khyber Pass Road, and that there is a compulsory-stop sign in Mountain Road close to the intersection of that road with Khyber Pass Road. Therefore, the intersection must, for the purposes of cl. 6 of Reg. 14, be deemed to be a "controlled intersection."

There appears to be a serious omission in the Traffic Regulations, 1936, relating to compulsory stopping places. Counsel stated that he has searched the regulations and has been unable to find any provision setting out the obligations of a driver on reaching an intersection where such a sign has been erected. Of course, the sign means what it says—namely, that a driver must stop his vehicle—but there is no penalty prescribed for his failure to do so, nor is there any regulation which even requires him to stop, or indicates when he may lawfully proceed after he has stopped. All the Traffic Sign Regulations do is to lay down the procedure to be followed by a local authority before it may lawfully erect a compulsory-stop sign.

This omission is serious, because, once the sign has been erected at an intersection, the right-hand rule ceases to apply to that intersection.

I think it may be assumed that the intended purpose of the compulsory sign is to give main-road traffic the right of way. Thus, at the intersection relevant to the present case, Khyber Pass traffic should have the right of way at all times against traffic proceeding across that road from Park Road to Mountain Road and *vice versa*. But the draftsman has not only omitted to insert the necessary clause to give effect to this intention, but has left the intersection an open intersection, to which the right-hand rule does not apply.

In *Hull v. Howard* ((1947) 5 M.C.D. 182), I stated that the regulation relating to approaching and crossing intersections is in urgent need of further revision and clarification. The position revealed in the present case adds to the urgency.

Information dismissed.

Solicitors for the defendant: *Holmden and Horrocks* (Auckland).

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PRATT v. SAMUELS.

1947. October 29. 1948. October 29, before Mr. R. FERNER, S.M., at Christchurch.

Municipal Corporation—Offences—Continuing Offences—Limitation on Same—Municipal Corporations Act, 1933. s. 370 (1).

Section 370 (1) of the Municipal Corporations Act, 1933—
which is as follows :

“ Every person guilty of a breach of any by-law made under
“ this Act is liable to a fine not exceeding twenty pounds ; or
“ where the breach is a continuing one, then to a fine not exceed-
“ ing five pounds for every day or part of a day during which
“ such breach continues.”—

provides for a maximum daily fine for a continuing offence and a maximum period so long as the offending state of affairs continues ; but it does not empower the Court to inflict a continuing fine *in futuro* ; that is to say, a penalty may be awarded in respect only of the days on which the breach is proved to have continued.

Semble, Section 370 (2) indicates that the Corporation, after obtaining a conviction for a continuing offence, may apply to the Supreme Court for an injunction.

Airey v. Smith ((1907) 76 L.J.K.B. 766) and *Russell v. Watson* ((1907) 2 M.C.R. 142) distinguished.

INFORMATION charging the defendant, as agent for the Christchurch City Council, for that :

“ having erected a building of the warehouse class within the space
“ of six months last past to wit on or about July 15, 1947, at Phillips
“ Street, Christchurch, in New Zealand, which building did not com-
“ ply with the requirements for the prevention of fire by having all
“ external walls of fire resistant construction as required by the
“ provisions of the Christchurch By-law No. 15, Clause 61 (1) (b)
“ did knowingly permit such condition of things to exist in breach
“ of the by-law aforesaid such breach being a continuing one.”

Lascelles, for the informant.

R. A. Young, for the defendant.

Cur. adv. vult.

FERNER, S.M. To this charge defendant, by his counsel, pleaded guilty. The charge was one of a group of several, and on this particular charge counsel for the Christchurch City Council, Mr. *W. R. Lascelles*, asked the Court to inflict a daily penalty to run during the continuance of the offence after conviction. I intimated that a daily penalty of 5s. would be appropriate to the case, but before I entered judgment I entertained some doubts as to the validity of a penalty in the form asked for, and intimated to counsel that I would hold the matter over for further consideration and invited counsel to submit

legal argument on the matter. Mr. *Lascelles*, for the prosecution, has now done so, and the Court is grateful to him for the assistance so given.

It seems to me that two elementary propositions must be kept in view in considering the question as to whether a penalty in the form asked for is authorized by statute in New Zealand. These are (i) a defendant cannot be convicted of an offence he has not committed, and (ii) a conviction can be based only on proper proof of the commission of an offence.

The substantial question at the moment is whether it is competent for this Court to impose a penalty *in futuro* on the authority of s. 370 (1) of the Municipal Corporations Act, 1933.

It is submitted for the prosecution that the words "a fine not exceeding five pounds for every day or part of a day during which such breach continues" can refer only to a fine *in futuro*, and that, if it was intended to refer to a period before conviction, then surely the wording would read "for every day or part of a day during which such breach continued." Mr. *Lascelles* relied on the case of *James v. Wyvill* (1884) 48 J.P. 725. In that case, the penalty imposed under a provision substantially the same as that now under consideration. The conviction was upheld on appeal, *Lord Coleridge, C.J.*, saying in the course of his judgment: "That is merely a matter of computing the total sum which the penalty is to amount to, and they are not to be broken into two parts and called separate penalties or separate offences. I think, therefore, there is nothing wrong in this conviction" (*ibid.*, 726). But the Court does not appear to have discussed penalties *in futuro*. What that case clearly did decide is stated by *Lord Alverstone, C.J.*, in *Airey v. Smith* (1907) 76 L.J.K.B. 766 as follows: "Therefore upon the main point argued on behalf of the appellant—namely, that we ought to deal with the allowing the work to continue and the construction as two separate offences, and that consequently they should not have been charged in the same information, I am clearly of opinion that the contention is wrong, and that the later case of *James v. Wyvill*, where the language of the by-law was in effect the same as the substance of the enactment in s. 158, shows that that is the true view, and the one which ought to be adopted" (*ibid.*, 771).

And it is worthy of note that in *Airey v. Smith* the Magistrate had been careful not to impose a penalty *in futuro*, the exact words of the conviction being:

"to pay a penalty of £5, and a further penalty of £100, being £2 for each day for fifty days—namely, from August 18, 1906, to October 8, 1906."

It should be carefully noted that the information uses the language "knowingly permits," and it would be quite possible that after the conviction the defendant, amongst the many courses open to him, might part with the property. As stated by *Lord Alverstone, C.J.*, in *Airey v. Smith*: "It may be that, when the evidence comes to be given, it will be found that the appellant is not liable for keeping them there, and it may be that there is some other person who has kept or maintained the works so as to bring himself within the purview of the statute" (*ibid.*, 771). See also *Pomeroy v. Malvern Urban District Council* (1903) 89 L.T. 555. The words "knowingly permit" clearly imply guilty knowledge, and, in the circumstances I have mentioned—

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i.e., change of ownership—the words would clearly not apply to a defendant who had parted with the property. I think that this affords sufficient answer to Mr. *Lascelles's* contention; but Mr. *Lascelles* drew attention to s. 251 of the Local Government Act, 1933 (Eng.), (26 *Halsbury's Complete Statutes of England*, 295, 442), and especially to the final words in the section (which I have italicized): “if no sum is so fixed, *the sum of forty shillings for each day during which the offence continues after conviction therefor.*”

On the whole, I do not think this section assists him. Here, there is an express provision for dealing with offences after conviction as well as before conviction. Surely there was no need for such provision if the penalty could be imposed at the first hearing and *in futuro*. The imposition of any penalty *in futuro* and without proof is clearly contrary to the most elementary principles; and I think the words relied upon mean no more than that, for every day upon which the breach is proved to continue, a person is liable to a daily penalty. Even if there were doubt about it, the benefit of the doubt must be given to the defendant.

The only New Zealand case I have been able to find bearing on this subject is *Russell v. Watson* ((1907) 2 M.C.R. 142), in which *McCarthy*, S.M., although not dealing expressly with the point, appears to have adopted the view that it is only in respect of proved offences that a penalty can be imposed. In that case, he imposed a conviction in the following words: “The defendant is convicted as for a continuing offence and fined 3d. for each one of ninety-six days during which the offence was proved to have continued, in all 24s.” In this kind of case, if a penalty were imposed *in futuro*, then, clearly, before it could be enforced the defendant should have the opportunity to be heard. He may have disposed of the property after conviction, or sold it, or he may even be deceased. Upon a view of the case, I am of the opinion that s. 370 of the Municipal Corporations Act, 1933, entirely recognizes the principle of conviction on proof, and accordingly means no more than that a penalty may be awarded in respect of only such days as the breach is proved to have continued.

Consideration of subs. 2 of s. 370 indicates that the Council is not left without further remedy, for, after conviction, it may apply to the Supreme Court for an injunction. As a result, therefore, I hold that s. 370 of the Municipal Corporations Act, 1933, cannot be interpreted as claimed by the prosecution. The subsection provides for a maximum daily fine for a continuing offence and a maximum period—so long as the offending state of affairs continues, but that is all. Had it been the intention to empower the Court to inflict fines *in futuro*, clear words to that end would have been provided. The defendant will be convicted as for a continuing offence and fined the sum of 5s. for each of the ninety-seven days from July 15, 1947, to October 29, 1947, in all the sum of £24 5s. He will be ordered to pay Court costs and solicitor's fee £3 3s.

Defendant convicted.

Solicitors for the informant: *Weston, Ward, and Lascelles* (Christchurch).

Solicitors for the defendant: *R. A. Young and Hunter* (Christchurch).

